10-7-2013

Regan v. Owen Appellant's Brief Dckt. 40848

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRENT REGAN and MOURA REGAN, husband and wife,	)	DOCKET NO. 40848-2013
Plaintiffs/Respondents	)	Kootenai County Case No. CV-2011-2136
vs.	)	APPELLANTS' OPENING BRIEF
JEFF D. and KAREN A. OWEN, husband and wife,	)	
Defendants/Appellants.	)	

APPEAL FROM THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI

HONORABLE JOHN P. LUSTER
DISTRICT JUDGE, PRESIDING

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I. STATEMENT OF THE CASE

A. Nature of the Case

This case involves a suit brought by Brent and Moura Regan ("Regan") against Jeff and Karen Owen ("Owen") claiming: (1) interference with express easement rights across the north 30' of the Owen's parcel; (2) interference with an implied easement across a separate piece of property acquired by Owen in a tax deed sale; (3) a request to reform the Owen deed to adjust the north property boundary to encompass the land acquired by Owen in the tax deed purchase and (4) a claim that Regan established a prescriptive easement across a portion of the tax parcel. R pp. 14-22.

B. Course of the Proceedings

On March 11, 2011, Regan filed a verified complaint claiming easement rights for four separate parcels of property owned by Regan. AR pp. 14-70.[1] On April 19, 2011, Owen filed an Answer. AR pp. 71-75.

On September 1, 2011, Regan filed a motion for partial summary judgment, with supporting affidavits and memorandum, to declare the existence of the express easement across the Owen parcel and the right to develop it for road and utility purposes for the benefit of all parcels named in the complaint. AR pp. 142-162. The Owens filed a response to the Regans' motion on September 15, 2011, acknowledging that Parcel II described in the complaint was benefitted by the express easement. AR pp. 163-171. The court entered an Order on September 29, 2011, granting the Regans' motion to establish and use the express easement without hindrance for the benefit of Parcel II. R pp. 76-80.

[1] The Clerk's Record on appeal did not include the entire clerk's record as requested. A motion to augment the record was submitted to cure this defect. The reference to "AR" in this brief is to the Augmented Record submitted and the Bates Numbers included in the Augmented Record submitted.

On October 27, 2011, the Regans filed a Motion for a preliminary injunction and for a finding of contempt against the Owens, together with supporting affidavits and a notice of hearing of the contempt charge (which did not comply with I.R.C.P. 75). AR pp. 172-215. On November 3, 2011, Owen requested an enlargement of time to file objection to the preliminary injunction. AR pp. 216-217. On November 4, 2011, Owen filed its opposition to the preliminary injunction request and supporting affidavits. AR pp. 218-268. On December 7, 2011, Regan filed a supplemental supporting affidavits and a reply brief. AR 269-323. On December 13, 2012, Owen filed a notice of election to cross examine Regan's affiants. AR pp. 324-325.

On March 16, 2012, Owen filed a motion for leave to amend their pleadings to add a counterclaim for trespass based upon Regan dumping construction debris outside the boundaries of the easement onto their property. AR pp. 326-336. On March 16, 2012, the clerk inadvertently filed the counterclaim attached to the motion. AR pp.81-84.

On March 28, 2012, Owen filed a motion for relief from the pre-trial order to allow for a summary judgment motion outside the dates allowed in the Court's scheduling order. AR pp. 333-336. On March 28, 2012, Owen filed a motion for summary judgment with supporting affidavits. AR 339-364. The court denied the motion for relief from the pretrial order and did not consider the motion for summary judgment because the parties were on the edge of trial. AR 5, 3/29/2012 Motion Tr p. 13.

On May 14, 2012, Owen filed a motion in limine to preclude certain witnesses not previously disclosed by Regan from testifying, together with a supporting affidavit. AR pp. 365-382. Regan opposed the motion and moved for relief from the pre-trial scheduling order to allow Regan to serve supplemental discovery to name new witnesses. AR pp. 388-399. Regan

also filed a motion to continue the May 31, 2012 trial. The trial court granted the motion on May 25, 2012 and continued the trial. R p. 8, April 25, 2012 Transcript labeled "Motion to Compel". The Order related to these motions was entered June 20, 2012. R pp. 402-403.

On May 30, 2012 Owen again filed another notice of election to cross examine Regan's affiants at preliminary hearing. AR 400-401. On May 31, 2012 a preliminary hearing was commenced. May 31, 2012 Preliminary Hearing Tr. The preliminary hearing was reconvened on June 4, 2012. June 4, 2012 Preliminary Hearing Tr. The trial court issued its preliminary injunction order on June 19, 2012. R pp. 92-94.

On August 14, 2012, Regan filed a second motion for summary judgment, together with supporting briefs and affidavits. AR pp. 404-528. On August 30, 2012, Owen filed their opposition brief and affidavits. AR pp. 531-601. Regan filed their reply brief on September 6, 2012. AR pp. 638-646.

On August 16, 2012, Owen moved for leave to amend their affirmative defenses to include the statute of limitations defense for mistake, found at I.C. § 5-218(4).

On September 4, 2012, Owen filed their second motion for summary judgment. AR pp. 546-637. Owen filed their brief and affidavits in opposition to Owen's motion on September 18, 2012. AR pp. 647-673. On September 25, 2012, Owen sought an enlargement of time to file their reply brief. The reply brief was filed September 27, 2012. AR pp. 676-685. On November 7 2012, the trial court issued its opinion on both motions. R pp. 95-112.

On November 21, 2012, Owen filed a notice of acceptance of Regan's Rule 68 offer of judgment on the trespass counterclaim. R. pp. 113-115. On November 29, 2012, to clear up procedural irregularities in the filing of the trespass claim, an order granting leave to file the

claim was entered. R pp. 116-117. A signed counterclaim was filed November 29, 2012. R pp. 118-123.

On January 23, 2013, the parties stipulated to the dismissal of contempt claims brought by both parties. AR pp. 686-687. On February 17, 2013, an order was entered dismissing both parties' motions for contempt and releasing the cash deposit posted by Regan in connection with the preliminary injunction. AR pp. 688-689.

On February 7, 2013, a final judgment was entered. R pp. 124-128. A notice of appeal was filed March 21, 2013. R pp. 129-132.

C. Concise Statement of Facts

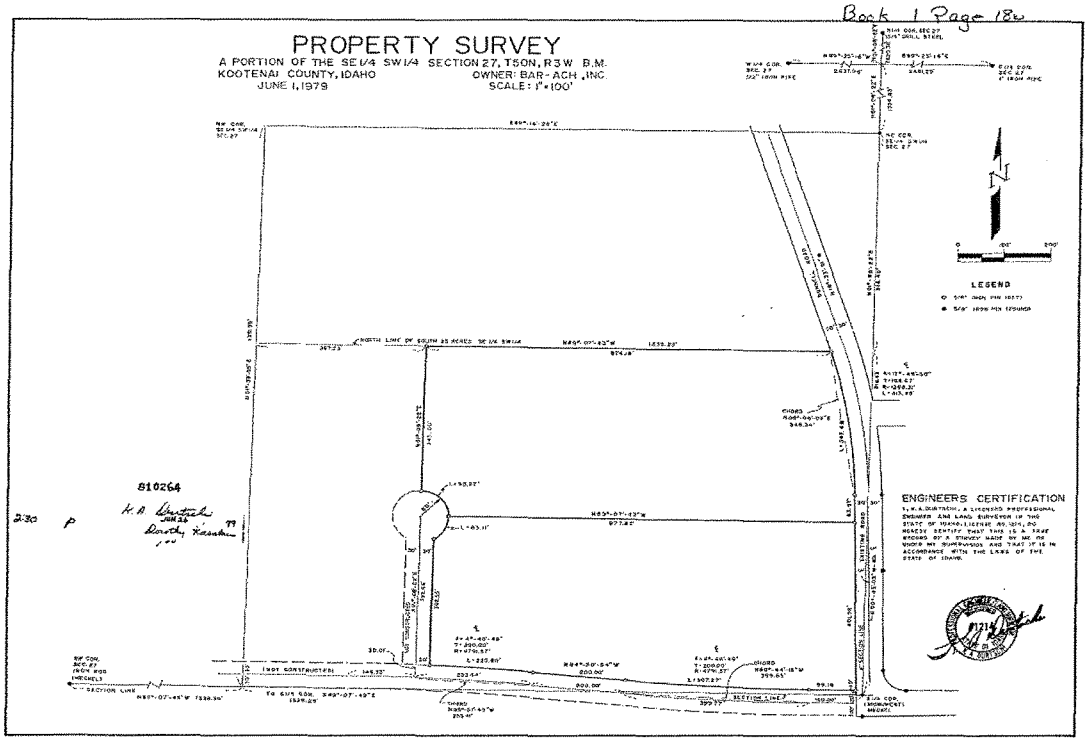
This case involves property situated in Sections 27 and 34 of Township 50 North, Range 3 West Boise Meridian, Kootenai County, Idaho. Section 27 lies immediately north of Section 34. The following statement provides facts regarding the various relevant parcels and the facts about the access road.

1. Common Grantor

On July 24, 1978, BAR-ACH, Inc. transferred title to a sizeable portion of real property to ACH. AR pp. 551-553. BAR-ACH, Inc. thereafter dissolved on August 2, 1978. AR p. 549. Robert Collins subsequently passed away in 1987, and his children, Thomas Collins and Judy Baker were appointed as personal representatives for his estate. AR pp. 461-462.

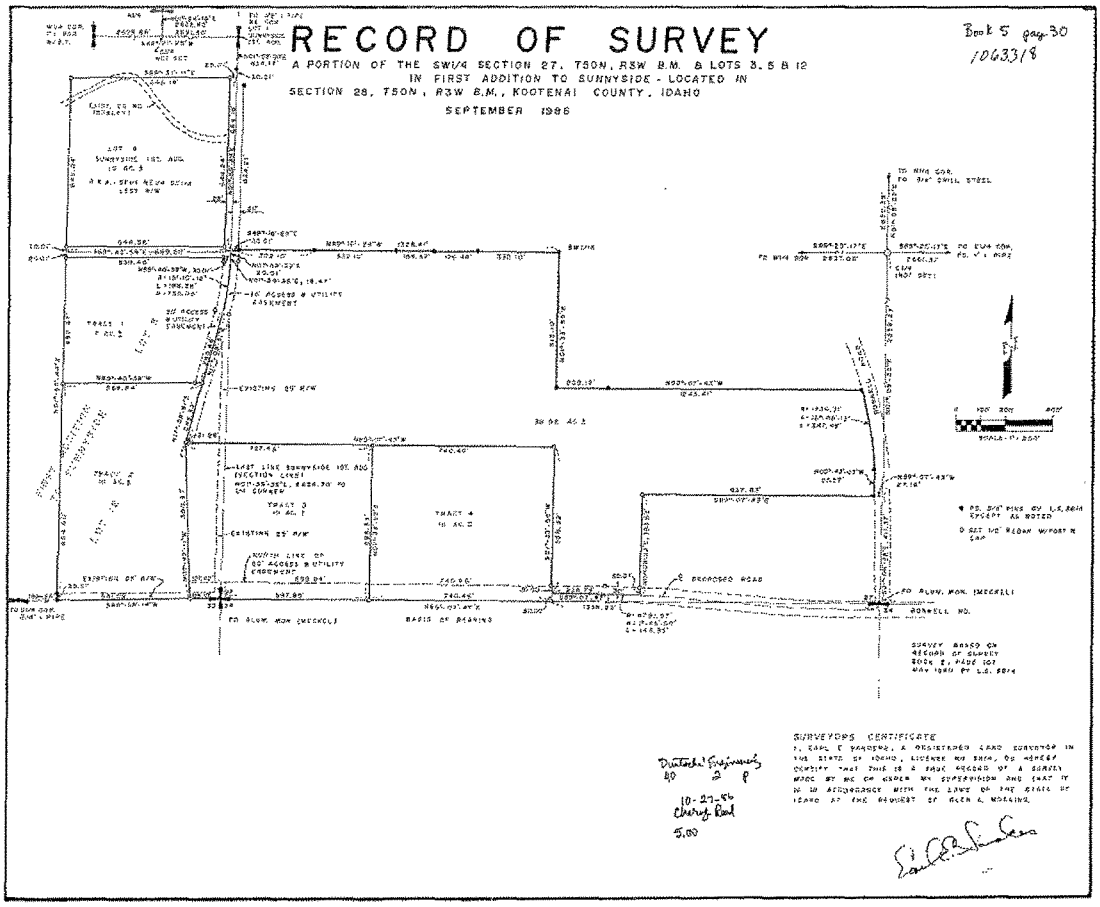
On June 26, 1979, a property survey which indicated it was prepared by Earl Sanders, working for K.A. Durtschi, was recorded as Instrument No. 810264 in Book 1, Page 186, Records of Kootenai County. AR p. 350. This property survey depicted a proposed subdivision of land creating three (3) parcels of land lying in the Southeast Quarter of the Southwest Quarter of Section 27, including a proposed 60' road on the southern boundary of

the subdivision and a proposed 60' cul-de-sac road within the interior of the subdivision. The survey indicated both roads were "not constructed". The alignment for the southern road was depicted as lying mostly south of the section line on its eastern end, and the swinging north of the section line from Section 34 entirely into Section 27 near the cul-de-sac. The survey indicated it was prepared for BAR-ACH. For ease of following the facts, the survey is included below and a full size copy is contained in Appendix A to this brief:



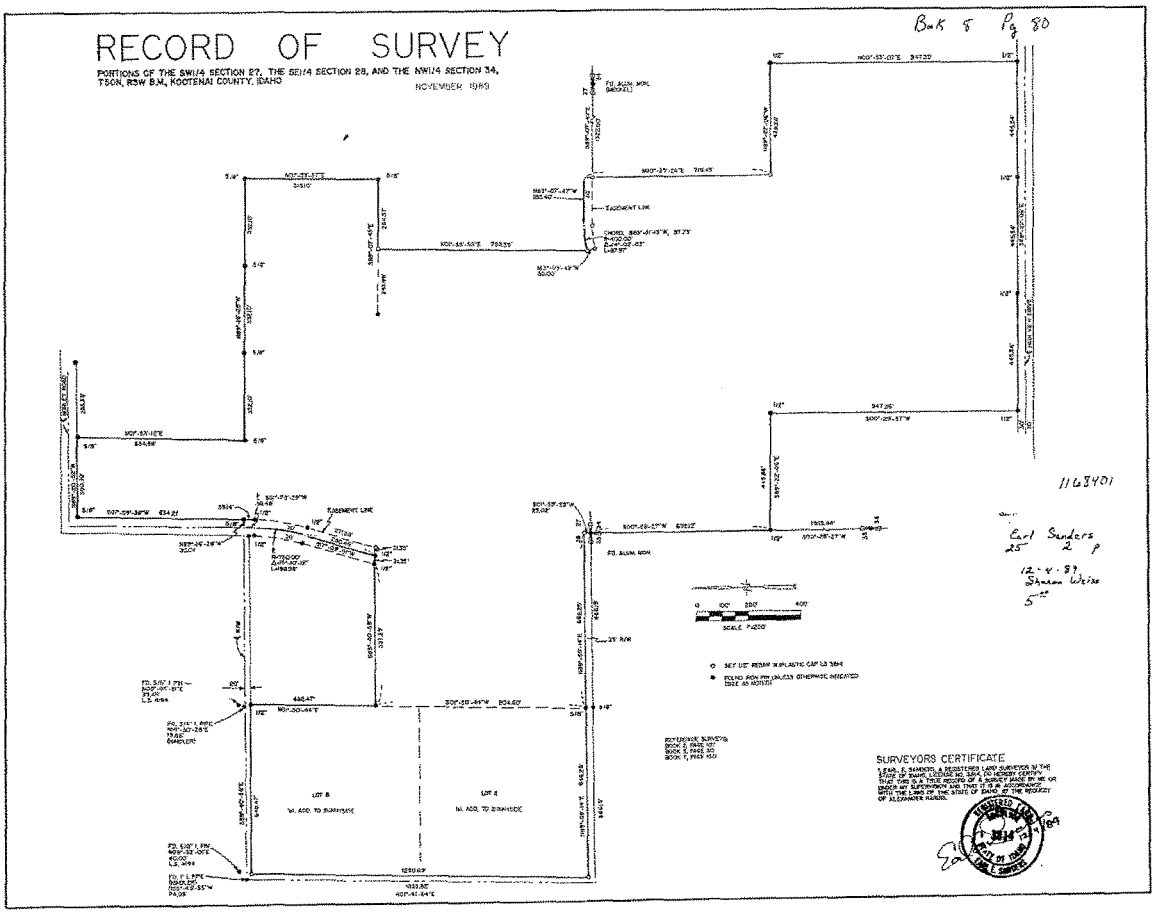
On October 27, 1986, another Record of Survey, again prepared by Earl Sanders working for Durtschi Engineering, was recorded as Instrument No. 1063318 in Book 5, Page 30, Records of Kootenai County, showing a completely different subdivision of the Southwest Quarter of Section 27 and lots 3, 5 and 12 of the First Addition to Sunnyside in Section 28, immediately west of Section 27. AR p. 351. This survey indicated it was prepared for Glen E.

Moering.[2] This property survey depicted a wholly different proposed subdivision of land than depicted in the 1979 property survey. Although this property survey depicted the same general area, it contained 6 lots, four of which were designated as Tracts 1-4. The only lot similar to the 1979 survey was a lot in the southeast corner of the survey. No cul-de-sac was depicted on the survey. This survey continued to depict the access road as a "proposed road". The survey showed rebar set on the Section 27 and Section 34 dividing line coincident with the corners of these tracts. This survey is depicted below and a full size copy is contained in Appendix B to this brief :



[2] The district court indicated in its decision and order on appeal that this survey was prepared for ACH. R p. 96. However, there is nothing in the record that supports this finding.

On December 4, 1989, a Record of Survey prepared by Earl Sanders was recorded as Instrument No. 1168401 in Book 8, Page 80, Records of Kootenai County, Idaho. AR p. 360. This survey indicated on its face it was prepared at the request of Alexander Hargis. This survey is depicted below and a full size copy is contained in Appendix C to this brief.

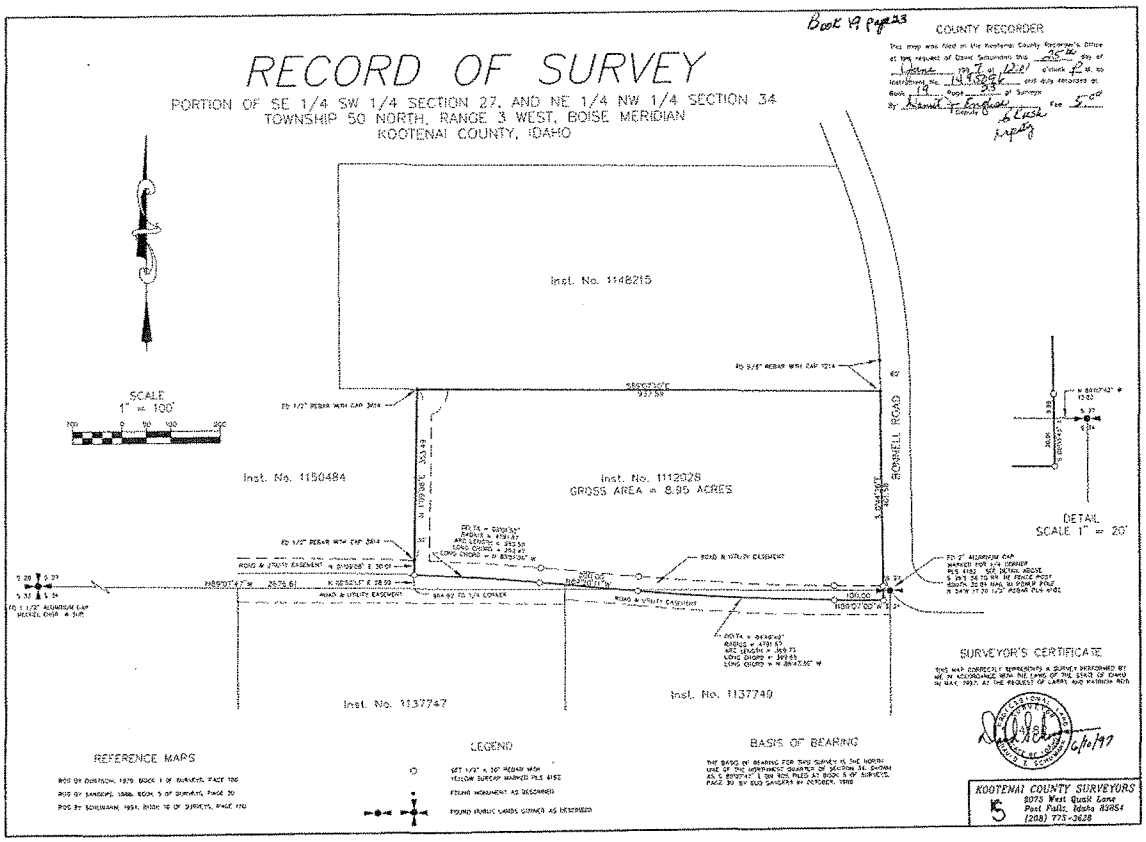


2. Hart Parcel

By warranty deed recorded on March 24, 1988 as Instrument No. 1112028, Records of Kootenai County, ACH conveyed a parcel to Patricia Hart in the Southeast Quarter of the Southwest Quarter of Section 27. R pp. 40-42. This warranty deed reserved a 30' road easement on the southern and western boundary of the Hart parcel. This lot is the lot depicted

in both the southeast corner of both the 1979 survey and the 1986 survey. Hart has had the last name of Reid and Honeyman since her purchase. R pp. 40-48.

On June 25, 1997, a record of survey was recorded on behalf of Larry and Patricia Reid by David Schumann as Instrument No. 1495096 in Book 19, Page 23 of a portion of the Southeast Quarter of the Southwest Quarter of Section 27 and the Northeast Quarter of the Northwest Quarter of Section 34. AR p. 352. This survey depicted five existing parcels of property, including the Hart and the Owen parcel, and referenced the instrument number by which the parcels were created. The survey showed that the 1979 cul-de-sac concept had been abandoned by ACH when surrounding properties were granted. It showed the 30' easement across the southern portion of the Hart parcel. It also showed the 30' easement across the Owen parcel. The survey clearly depicted a gap, or median, between the road and utility easement across the Section 27 properties and the Owen easement in Section 34. The survey is depicted below and a full size copy is contained in Appendix D to this brief:



3. Smart/Owen Parcel

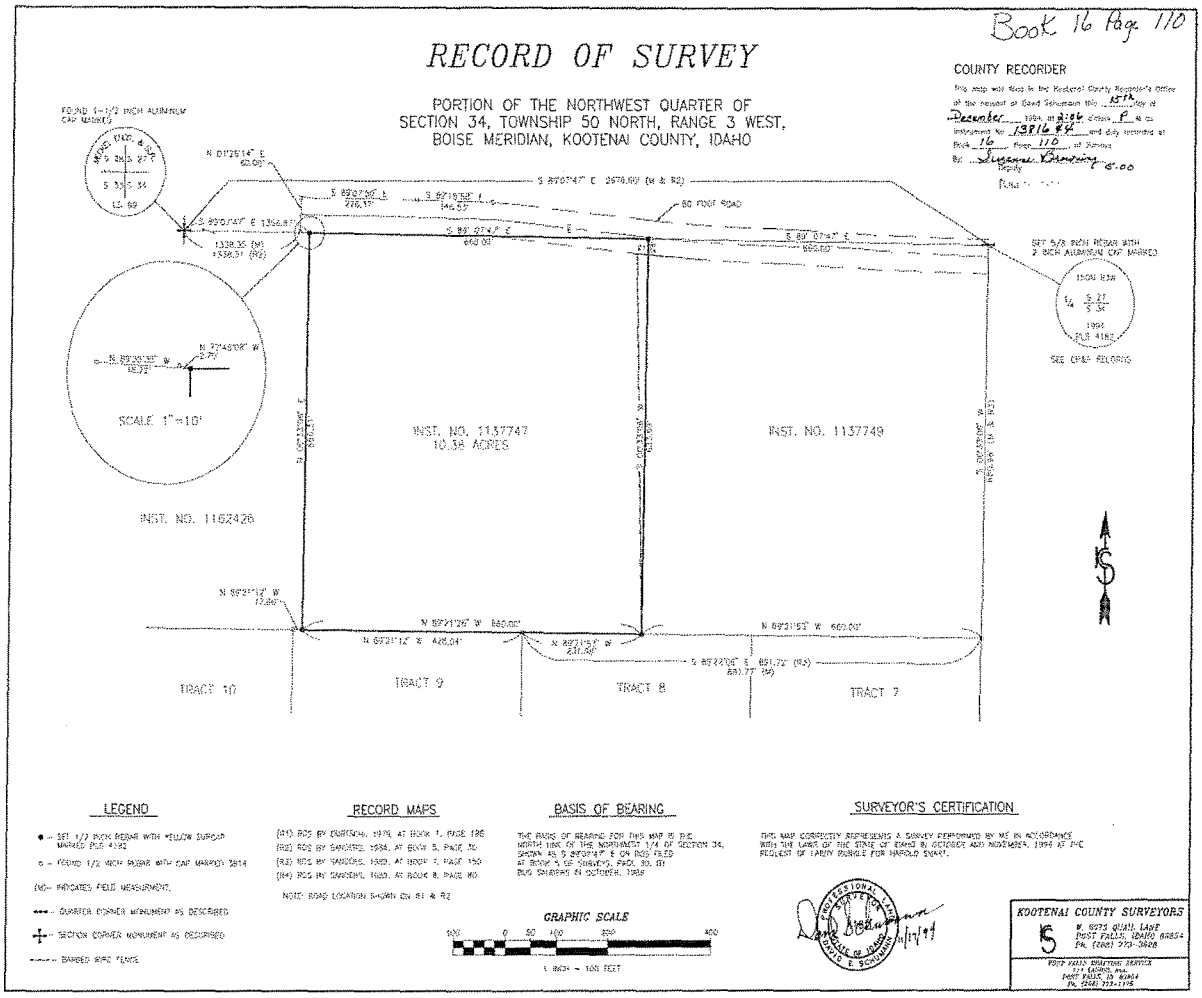
On December 28, 1988, a deed was recorded as Instrument No. 1137747 granting a parcel of property from ACH to Harold and W. Jean Smart, husband and wife. R pp. 30-32. The legal description of the parcel was contained in an incorporated Exhibit "A" and indicated that one of the property boundaries of the Smart parcel lay on the north line of the Northwest Quarter of Section 34. R p. 31. The deed reserved as easement to the Grantor for roadway and all utility purposes across the north 30 feet of the Smart parcel. R p. 31.

The Purchase and Sell Agreement identified the property being purchased by Smart as Lot 13, Vista Estates. AR pp. 582-584. A map of the "Vista Estates" tracts showed yet another configuration of proposed lots for sale by ACH different than those shown in the 1979 survey and the 1986 survey. AR p. 586. This map showed a straight road of unspecified width

passing in front of Lot 13 with no curve to the north, and curving south into Section 27 farther west. The only lot consistent with the 1979 and 1986 subdivisions was the Honeyman lot. An Addendum to the Purchase and Sale Agreement required the Seller to identify property corners 30 days after close of escrow. AR 584. It also required the seller to "provide an access road from Bonnell Road, along the North boundary of Parcel 14, to a point 30 feet West of the Northeast corner of Parcel 13. Said road shall consist of eight inches of base rock 28 feet wide." AR p. 584.

The legal description contained in Exhibit "A" was specially approved by each individual Grantor, including Thomas R. Collins, as demonstrated by their signatures following the legal description and a notation that stated "Approved" "Grantors". R p. 31.

On December 15, 1994, a Record of Survey of the Smart parcel prepared by David Schumann was recorded in Book 16, Page 110 as Instrument No. 1381644, Records of Kootenai County. AR p. 353. This survey was commissioned on behalf of Harold Smart. The corners of the Smart parcel were set as part of the survey. The survey is depicted on the next page and a full size copy is contained in Appendix E to this brief:



Thereafter, the Smart parcel was purchased by Cheryl Anne Bower. AR pp. 458-459. Bower sold the property to David and Helen Hanna. AR pp. 407-408. Jeff D. and Karen A. Owen ("Owen") purchased the ten acre parcel of property from Hanna by deed recorded February 11, 2003 as Instrument No. 1781225 in the Northwest Quarter of Section 34. R pp. 26-27. The northern boundary of the property was indicated in all the above deeds as being the section line of the Northwest Quarter of Section 34.

4. Johnson Parcel

Another deed was recorded on December 28, 1988 as Instrument No. 1137749, wherein ACH deeded a parcel to Judith Johnson located in the Northwest Quarter of Section 34,

immediately east of the Owen parcel and immediately south of the Southeast Quarter of the Southwest Quarter of Section 27. AR pp. 354-357. The legal description portion of the deed was again specifically approved in writing by ACH. AR p. 356. This warranty deed reserved a 30' road easement along the northern boundary of the Johnson parcel. AR 356.

5. Doney Parcel

By warranty deed recorded June 5, 1989, ACH transferred a parcel in the Southwest Quarter of Section 27 to Robert and Deborah Doney. R p. 33-35.

6. Marchelli Parcel/Regan Parcel II

On September 18, 1989, ACH entered into a Real Estate Contract with the Leslie Jean Schunemann Marchelli Trust (Marchelli) with respect to a parcel of property described by a metes and bounds description situated in a portion of Sections 27, 28 and 34.[3] R pp. 49-61.

On March 3, 1999, Marchelli deeded several parcels of property to Brent and Moura Regan ("Regan"). R pp. 23-25. The parcels were identified on an incorporated Exhibit "A" which identified them under headings designated as Parcels I, II, III and IV. Parcel I contained 5 tracts of land in the First Addition to Sunnyside. R pp. 24-25. Parcel II contained a metes and bound description of land situated in Sections 27, 28 and 34. R p. 24. Parcel II matched the legal description of the property granted to Marchelli by ACH. R p. 60. Parcel III was a metes and bounds description of land situated in the Southwest Quarter of Section 27. R p. 24-25. Parcel IV was a parcel described in aliquot part situated in the Southwest Quarter of Section 27.

[3] The district court indicated that the legal description in the 1989 Real Estate Contract and the Warranty Deed between ACH and Marchelli sets the southern boundary of Regan's Parcel II as the centerline of the proposed road that is in dispute in this matter. R p. 97. This finding is wrong. Utilizing the 1989 survey prepared for Hargis, it is clear the Marchelli calls in this legal description utilized this survey. The call to the center of a road is to a county road, High View Drive. Further, the call is to the northern edge of the road, not the centerline of the road as indicated by the district court.

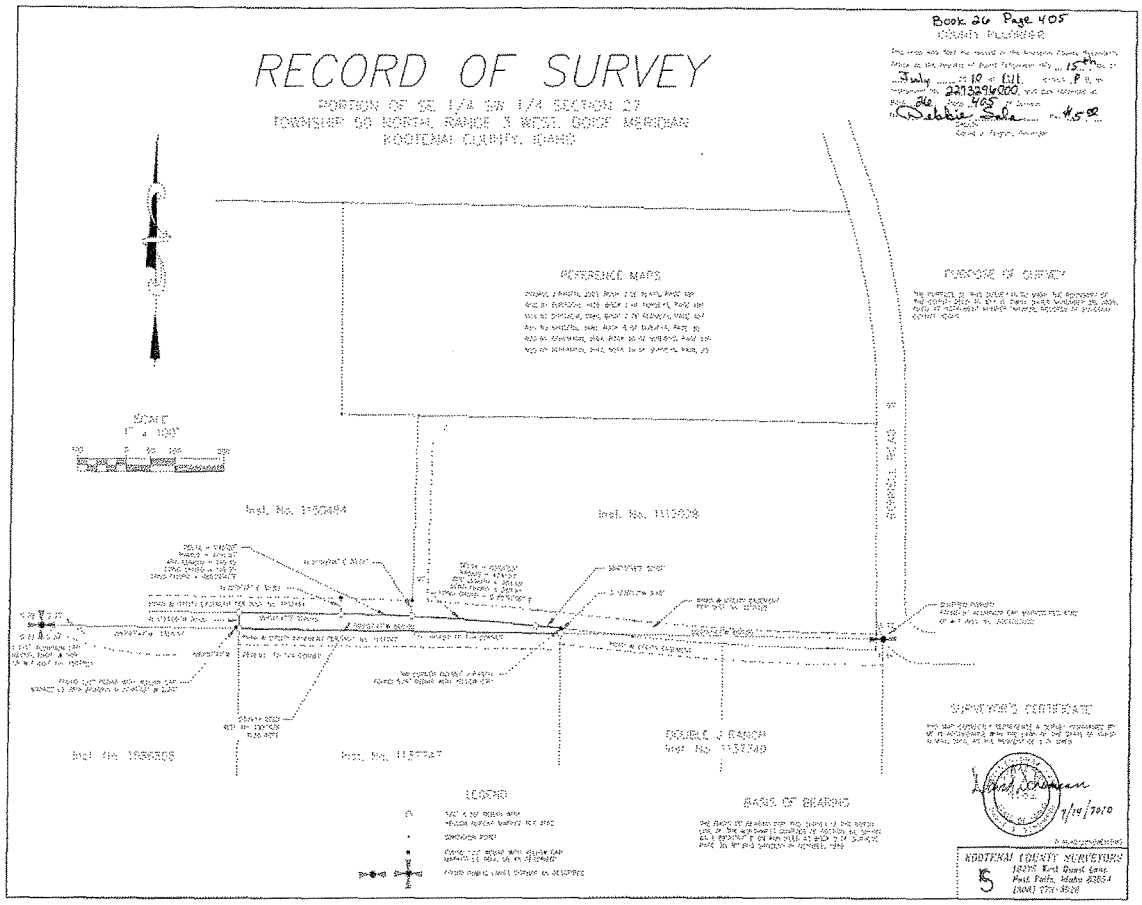
R p. 25. Subsequently Marchelli received a fulfillment warranty deed from ACH, which was recorded April 30, 1999. R pp. 62-66.

7. Tax (Orphan) Parcel

The deed from ACH to Marchelli left a parcel of land remaining with ACH. It is the median identified by Schumann in his 1997 survey. In 1999, Kootenai County assigned this parcel a tax number identified as 50N03W-28-7160. AR pp. 430-434. The taxes for this parcel were sent to Alexander Hargis for payment. *Id.* Payment was not made.

On April 14, 2004, Kootenai County recorded a tax deed for Parcel # 50N03W-27-7160 situated in Section 27 (hereafter referred to as "tax parcel") for failure of the record owner to pay real property taxes for the year 2000. R pp. 67-68. The deed indicated the record owners were ACH. R p. 67. The tax parcel is roughly triangular in shape. AR p. 361. The county tax deed conveying this parcel to Owen was recorded November 28, 2005. R p. 245.

On July 15, 2010, a survey of the tax parcel was recorded in Book 26, Page 405, as Instrument No. 2275296000, Records of Kootenai County. AR p. 361. This survey is depicted on the next page and a full size copy is contained in Appendix F to this brief.



8. The Access Road

An access road was developed in the proximity of the Section 27 and Section 34 line. When the access road was developed and how far it was developed at any given period of time is highly disputed in this matter. Thomas Collins, testified at the time of the sale of the Smart parcel that there was an existing unimproved roadway that started at the corner of Bonnell Road and continued westerly roughly along the centerline surveyed by Durtschi in 1979. AR p. 462. Thomas Collins has been an attorney licensed to practice in Washington since 1968. AR p. 461. Collins affidavit testimony gave no indication on how far the access road extended west at the time of the Smart sale. On January 18, 1994, Collin prepared a letter to a local attorney, Bob Fasnacht, responding to concerns about fulfilling the road construction obligation

in the Smart sales agreement. AR p. 503. This letter indicated it was ACH's intention to commence work to improve the road in the spring of 1994.

Smart similarly testified in his affidavit in 1988 there was an existing unimproved roadway that started at the corner of Bonnell Road and continued westerly along the northern boundary of the property. AR p. 436. Which of the two potential northern boundaries is not clarified in the affidavit (the section line or the 1979 proposed road boundary). Smart also testified in his affidavit that prior to making the offer, "we understood that the centerline of the existing unimproved roadway marked the northern boundary of Parcel 13." AR p. 436. Smart further testified when they purchased, they understood that Bar-Ach owned adjacent property to the East and West of Parcel 13. AR p. 436.

Fourteen days after providing this affidavit, Smart participated in a deposition. AR pp. 539-546. In that deposition he clarified his affidavit testimony, and in some instances, contradicted it.

Smart testified when they purchased the parcel, they looked at the property on their own, and then contacted someone about purchasing it. Harold Smart does not specifically recall the name of the person he contacted, but believed it was somebody by the last name of Kelly. AR p. 559 (Smart Dep. Tr. p. 11, ll. 25; p. 12, p. 13, ll. 1-3). Yet in his affidavit, Smart was able to testify to the realtor's full name. AR p. 436. Smart indicated that Kelly was a realtor. AR p. 561 (Smart Dep. Tr. p. 18, ll. 5-24).

When Smart purchased the property, the property was described as "Parcel 13, Vista Estates". AR p. 582. Parcel 13 was depicted as part of a series of parcels of the land being offered for sale, as well as those that had sold. AR p. 486. Parcel 13 of Vista Estates depicted

a straight road along the northern boundary of Parcel 13, not a curved road as shown in the 1979 and 1983 surveys. AR p. 586.

Regarding any agreements reached between the parties as established by parole evidence outside the purchase and sale agreement, Smart does not know why he thought he owned to the middle of the road. AR p. 567 (Smart Dep. Tr. p. 40, ll. 3-17). He does not recall anyone telling him that. AR p. 575 (Smart Dep. Tr. p. 72, ll. 23-25; p. 73, ll. 3-8). Smart believes it was an assumption he made. AR p. 575 (Smart Dep. Tr. p. 73, ll. 7-8). Smart never saw any development plan when purchasing the lot. AR p. 571 (Smart Dep. Tr. p. 19, ll. 12-19). Contrary to his affidavit testimony, he testified he had no knowledge of what was owned by his seller, nor did he see their development plans. AR p. 561 (Smart Dep. Tr. p. 19, ll. 10-24). He never even met the developer. AR p. 561 (Smart Dep. Tr. p. 19, ll. 25; p. 20, ll. 1-2).

With respect to the road, Smart's deposition testimony regarding its existence and extension along the northern boundary is contrary to his affidavit. Smart's recollection of the road as it existed when he looked at the property was that it wasn't very well defined and went along the side of the property and ended on the side of the property. AR p. 562 (Smart Dep. Tr. p. 20, ll. 9-25). Smart recalls the road having been plowed out straight and being 30 or 40 feet wide. AR p. 562 (Smart Dep. Tr. p. 22, ll. 25; p. 23, ll. 1-11). Smart recollects the topography as being fairly flat, but dropped away either on their property or beyond it. AR p. 563 (Smart Dep. Tr. p. 24, ll. 5-16). Smart does not recall the road he saw having a bend in it and there were no banks on the road. AR p. 563 (Smart Dep. Tr. p. 26, ll. 23-25, p. 27, ll. 1-12; p. 76, ll. 23-25; p. 77, ll. 1-12). When the Smarts pulled off to the south side of the road onto the property they were purchasing, it was a flat area. AR p. 565 (Smart Dep. Tr. p. 33, ll. 15-24).

In his affidavit, Smart testified that they hired attorney Robert Fasnacht because the road from Bonnell to their parcel had not been improved as promised by Bar-Ach. Smart testified in his affidavit that Exhibit 4 to his affidavit were true and correct copies of a letter Fasnacht sent to Kelly and a letter Fasnacht sent to them. AR p. 438. At deposition, in discussing Exhibit 4 to his affidavit filed in this matter, Smart testified he did not recall ever seeing the letter from attorney Robert Fasnacht to George Kelly. AR p. 571 (Smart Dep. Tr. p. 57, ll. 9-16). Smart indicated the letters weren't from his files because he had no documents. AR p. 571 (Smart Dep. Tr. p. 56, ll. 9-18).

There was other evidence in the record before the trial court that indicated that there was a material dispute of fact regarding the existence and location of the road at the time Smart purchased. At the preliminary injunction in this matter, Honeyman testified she purchased her parcel in 1979 even though the deed was not recorded until March, 1988. 5/31/12 Preliminary Hearing Tr p. 198, ll. 16-24; p. 199, ll. 21-23. There was no access road along her southern boundary. *Id.* She testified that an access road was constructed in the late 1980's by BAR-ACH to approximately the east boundary of the Owen parcel to give access to give Johnson access. 5/31/12 Preliminary Hearing Tr p. 202, l 25; p. 203, ll. 1-14. Hart testified the access road was extended west by BAR-ACH in the early 1990's to the end of her property. 5/31/12 Preliminary Hearing Tr p. 203, ll. 15-25; p. 204; p. 205, ll. 1-8.

According to the affidavit testimony of David Johnson, Judith Johnson's husband, there was no driveway to the Johnson parcel when the Johnson parcel was purchased. AR pp. 362-364. ACH promised to construct a road for Johnson to use to access Bonnell Road, which lay to the east. *Id.* ACH followed through on this promise and constructed a road fronting the

Johnson parcel and connecting to Bonnell Road. *Id.* This road terminated at what is now the east boundary of the Owen parcel. *Id.*

Another item of evidence that directly disputes Thomas Collins' testimony that the road was constructed at the time the Smart sale occurred in December 1988 is Paragraph 17 of the September, 1989, Marchelli Real Estate contract, which provided:

> 17. Gravel Road. Seller at Seller's expense will construct a 20-foot wide gravel road extending from Bonnell Road westerly to a point 20 feet west of the southeast corner of the property described in Exhibit "B" within five (5) years after the date first above written.

R p. 54-55.

Parcel "B" described a piece of property previously granted by ACH to Robert Doney. R p. 61, This parcel is now owned by Joseph and Margarita Lonam. R pp. 36-37.

Collins testified there was no physical or topographic reason for the access road to have been non-contiguous. AR p. 465. The tax parcel has a sloped terrain, with an embankment near its north edge. AR 236, 5/31/12 Preliminary Hearing Tr p. 259, ll. 8-13. Photographs of the tax parcel lodged on appeal demonstrate its topography, with an embankment on the south side. Exhibit BBB, CCC, DDD and EEE. These photographs demonstrate the elevation of the south side of the tax parcel is higher than the elevation on the north side. The north side lay along the toe of the slope. The 1979 proposed access road appears to follow the toe of this slope and accounts for the swing north.

9. Source of Mistake in the Deed

Collins testified in his affidavit that he was "informed" that the legal description used in the warranty deed to Smart was provided by Kelly. AR p. 465. Collins provides no source of this information. Collins testified that the legal descriptions for Hart, Johnson, Doney and Marchelli were prepared by ACH's surveyor. AR p. 465.

Pioneer Title's title commitment indicated that Pioneer Title generated the legal. AR pp. 504-513. David English, a title officer with Pioneer Title, testified that it was his recollection that Pioneer Title requested the seller provide a more specific legal description and a hand note in the file indicated Kelly provided it. AR pp. 504-505.

Smart recalls work on a survey being done after he returned to his home in Michigan. AR p. 561 (Smart Dep. Tr. p. 17, ll. 18-25). Smart believes a survey was probably done to obtain a legal description of the property he was purchasing, but does not recall seeing the survey. AR p. 561 (Smart Dep. Tr. p. 17, ll. 24-25; p. 18, ll. 1-4). Smart confirmed that the purchase and sale agreement required the seller to obtain a survey. AR p. 564 (Smart Dep. Tr. p. 28, ll. 20-25; p. 29, ll. 1-2; p. 29, ll. 9-19). The purchase and sale agreement required the seller to mark the property corners 30 days after close. Smart does not know if that occurred because he was in Michigan at that time. AR p. 564. (Smart Dep. Tr. p. 31, ll. 5-13).

II. ISSUES ON APPEAL

1. Did the district court err in ruling that the applicable statute of limitation had not ran?

2. Did the district court err in granting summary judgment and allowing deed reformation?

3. Did the district court err in holding Owen was not a bona fide purchaser?

4. Did the district court err in failing to address the waiver and estoppels issues raised by Owen in opposition to Regan's second motion for summary judgment?

5. Did the district court err in addressing the prescriptive easement claim in the memorandum decision on Regan's second motion for summary judgment?

III. STANDARD OF REVIEW

In *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007), this court reviewed the standard of review for summary judgment when no jury trial was requested and held:

> On appeal from the grant of a motion for summary judgment, this Court's standard of review is the same as the standard used by the district court originally ruling on the motion. *Intermountain Forest Management v. Louisiana Pacific Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001). Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c).
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> The burden of proving the absence of material facts is upon the moving party. *Thomson v. City of Lewiston,* 137 Idaho 473, 476, 50 P.3d 488, 491 (2002); *see also Petricevich v. Salmon River Canal Co.,* 92 Idaho 865, 452 P.2d 362 (1969). The adverse party, however, "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e). The moving party is therefore entitled to a judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial. *See Thomson,* 137 Idaho at 476, 50 P.3d at 491, *Badell,* 115 Idaho at 102, 765 P.2d at 127.
>
> When an action, as here, will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences. *Intermountain Forest Management,* 136 Idaho at 235, 31 P.3d at 923. Resolution of the possible conflict between the inferences is within the responsibilities of the fact finder. *Cameron v. Neal,* 130 Idaho 898, 900, 950 P.2d 1237, 1239 (1997). This Court exercises free review over the entire record that was before the district judge to determine whether either side was entitled to judgment as a matter of law and reviews the inferences drawn by the district judge to determine whether the record reasonably supports those inferences. *Intermountain Forest Management,* 136 Idaho at 236, 31 P.3d at 924.

With respect to drawing probable inferences from the evidence presented when a court trial will be held, this Court has clarified that:

> There is a fine line between drawing the most probable inferences and weighing the evidence, and this Court holds the belief that the district court should have allowed the case to go to trial in order to weigh the conflicting evidence and test the credibility of the witnesses. *Capstar Radio Operating Company v.Lawrence,* 153 Idaho 411, 288, 283 P.3d 728, 733 (2012).

Further, in *Mickelsen v. Broadway Ford, Inc.*, 153 Idaho 149, 154, 280 P.3d 176, 181 (2012), this court held:

> At summary judgment, when reasonable minds can come to but one conclusion on an issue of fact, a judge may decide the issue as a matter of law. *See Hayes v. Union Pacific R. Co.,* 143 Idaho 204, 208, 141 P.3d 1073, 1077 (2006).

IV. ARGUMENT

A. Introduction

This case involves a common Grantor who sold several parcels of property. Regan seeks to reform a neighbors' deed to include land not originally included by the Grantor in the neighbor's deed. These neighbors are Owen. The land that is sought to be included in the legal description of the Owen's deed lay north of Owen's parcel, and was subsequently purchased for value by Owen at a tax deed sale. The purpose of Regan's request to reform Owen's deed is to shift the burden of an express easement in favor of Regan across Owen's property from Owen's property onto the property purchased by Owen at a tax sale.

The district court granted summary judgment to Regan in this matter holding that it was undisputed that it was always the intention of the original owner and the original grantee that the northern boundary of the Owen parcel would encompass the tax parcel subsequently acquired by Owen. This finding was based upon a 1979 subdivision survey containing a proposed alignment for an unconstructed access road. R p. 102. The trial court ignored Owen's claim that reformation was not an equitable remedy available to Regan due to their

development of the express easement across Owen's parcel in the original location of the easement before reformation of the deed.

B. The district court erred in ruling the applicable statute of limitations did not bar the claim.

In this case, Regan claims there was a mutual mistake made in the legal description contained in the December 28, 1988 deed from ACH to Smart. Assuming arguendo that there was a mutual mistake in 1988, the trial court erred in finding that the Regan's claim was not barred by the applicable statute of limitation.

1. Regan had Standing to Bring their Claim for Deed Reformation based upon Mutual Mistake

No direct privity of contract exists between Regan and Owen. "Privity is defined as a mutual or successive relationship to the same property rights, or such an identification in interest of one person with another as to represent the same legal rights." *Silver Eagle Mining Co. v. State*, 153 Idaho 176, 280 P.3d 679, 683 (2012). This fact is not fatal to Regan's claim. "An action for reformation may be brought against those claiming under the original party to the instrument by privity including his or her heirs and personal representatives." 66 Am. Jur. 2d Reformation of Instruments § 98 (database updated September 2013): However, Regan obtained no greater rights to reform Owen's deed due to mutual mistake than ACH possessed. "The assignee of a contract is subject to the defenses which could be urged against his assignor." *Anderton v. Waddell*, 86 Idaho 220, 224, 384 P.2d 675, 677 (1963).

2. The Applicable Statute of Limitations

The statute of limitations for a mutual mistake in a deed is controlled by Idaho Code 5-218(4), which provides in relevant part:

> Statutory liabilities, trespass, trover, replevin, and fraud. Within three (3) years:.
> . . .

> 4. An action for relief on the ground of fraud or mistake. The cause of action in such case not be deemed to have accrued until the discovery, by the aggrieved part, of the facts constituting the fraud or mistake.

The Court of Appeals discussed the application of this statute to a deed reformation case in *Aiken v. Gill*, 108 Idaho 900, 902, 702 P.2d 1360, 1362 (Ct. App.1985), holding:

> However, in applying the statute to a fraud case, our Supreme Court has held that "actual knowledge of the fraud will be inferred if the allegedly aggrieved party could have discovered it by the exercise of due diligence." *Nancy Lee Mines, Inc. v. Harrison,* 95 Idaho 546, 547, 511 P.2d 828, 829 (1973). We believe the same principle logically applies to causes of action based upon mistake. Accordingly, we hold that an action seeking relief from mistake will be time-barred under I.C. § 5–218(4) unless it is filed within three years after the mistake could have been discovered in the exercise of due diligence. *Accord Black Leaf Products Co. v. Chemsico, Inc.,* 678 S.W.2d 827 (Mo.App.1984); *Haddad v. Boon,* 609 S.W.2d 609 (Tex.Civ.App.1980).
>
> . . .
>
> An issue of due diligence is one of fact, to be addressed in the first instance by the trial court. *See Full Circle, Inc. v. Schelling,* 108 Idaho 634, 701 P.2d 254 (Ct.App.1985); *Reis v. Cox,* 104 Idaho 434, 660 P.2d 46 (1983). Where, as here, no finding has been made upon a material issue, the case must be remanded unless the record is clear and "yields an obvious answer to the relevant question." *Pope v. Intermountain Gas Co.,* 103 Idaho 217, 225, 646 P.2d 988, 996 (1982).

The Missouri case cited with approval by the Court of Appeals, *Black Leaf Products Co. v. Chemsico, Inc.,* held:

> The Missouri Supreme Court has stated that one is held to have discovered facts when he could have discovered them with the exercise of ordinary care or due diligence in the circumstances. *Brown v. Irving-Pitt Mfg. Co.,* 316 Mo. 1023, 292 S.W. 1023, 1025 (Mo.1927). Generally, a party cannot avoid the bar of the statute of limitations if he had the means to discover the facts giving rise to his action. *Briece v. Bosso,* 158 S.W.2d 463, 467 (Mo.App.1942). "There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself." *Id.*
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> *Black Leaf Products Co. v. Chemsico, Inc.,* 678 S.W.2d 827, 831 (Mo.App.1984).

3. Regan's Deed Reformation Claim is Time Barred

The trial court erred in its analysis of this issue. Regan claims to be an aggrieved party by the alleged mistake committed by ACH in the course of ACH's sale of the property to Smart. Regan claims that the mistake has impaired his right to an express easement over the

tax parcel. The question presented by Owen's summary judgment motion was when, by the exercise of due diligence, should the alleged mistake have been discovered by ACH or Regan, or both. In its analysis of this issue, the trial court did not consider the actual knowledge known to Regan's predecessor, ACH, or the facts of which there was constructive notice.

Generally, a party cannot avoid the bar of the statute of limitations in a deed reformation case if he had the means to discover the facts giving rise to his action. *Briece v. Bosso*, 158 S.W.2d 463, 467 (Mo.App.1942). The Smart deed was executed by the grantors between November 25, 1988 and December 8, 1988, and recorded December 28, 1988. R p. 30-32. The legal description contained in the deed was individually reviewed by each individual grantor as verified by each grantor's signature separately approving the legal description used in Exhibit "A". R p. 31.

The approved legal description indicated that the Smart parcel was situated in the Northwest quarter of Section 34 and that one of the boundaries commenced at "... a point on the North line of said Northwest quarter; thence South 89 07'48" East **along the North line of said Northwest quarter**, a distance of 660.00 feet more or less..." (Emphasis added).

At the time this legal description was reviewed and approved by ACH, ACH had actual and constructive notice of the 1979 survey and the 1986 survey regarding the proposed road alignment. Both surveys depicted the road swinging north of the Section 34 section line into Section 27, and the road being joined throughout its course. And constructive and actual notice at the time they approved the legal description for the Smart parcel that the northern boundary of the Smart parcel would lie south of the 1979 proposed road alignment. If ACH had been exercising ordinary care and due diligence at the time of approving the legal description, ACH should have discovered the mistake in 1988 at the time the Smart deed was prepared. Thus, the

statute of limitations ran against ACH in 1991. Because Regan has no greater right than possessed by his Grantor, Regan is barred from bringing a claim to reform the deed.

Further, by the year 1999 when Regan purchased the property, Regan had notice that they enjoyed the benefit of two express easements. There were plenty of records of survey that provided constructive notice that the tax parcel was not part of the Owen lot, that the 1979 proposed road alignment was not consistent with the easements reserved by ACH, and that there might be a mistake that existed. The 1979 and 1986 proposed access road alignment surveys were available showing the configuration and width of the planned access road. The Smart deed and the Hart deed indicated the location of the easements reserved by ACH for the benefit of the land being purchased by Regan across the respective parcels. The 1989 survey commissioned by Hargis showed the boundaries of the land sold to Marchelli, and excluded the tax parcel purchased by Owen. The 1994 Smart survey showed that the northern boundary of the Smart parcel ended at the section 34 line. The 1997 Hart survey clearly showed the two 30' easements reserved by ACH were not contiguous and the easements were separated by a median, resulting in an access road configuration distinctly different that the 1979 proposed road alignment. All of this information was available to Regan at the time they purchased. In the exercise of ordinary care and due diligence, the mistake alleged by Regan should have been discovered by Regan at the time of the purchase in 1999. Thus, Regan is time barred from bringing the claim.

C. The district court erroneously granted summary judgment on Reagan's deed reformation claim

1. Law applicable to deed reformation

When mutual mistake is alleged, parole evidence is admissible to show that mutual mistakes were made. *Collins v. Parkinson,* 96 Idaho 294, 296, 527 P.2d 1252, 1255 (1974). A

claim of mutual mistake invokes the equitable jurisdiction of the court, 27A Am.Jur.2d *Equity* § 45 (2008). . . ." *Bolognese v. Forte*, 153 Idaho 857, 862, 292 P.3d 248, 253 (2012).

In *Hughes v. Fisher*, 142 Idaho 474, 480, 129 P.3d 1223, 1229 (2006), this Court summarized the law applicable to reformation of a deed, and held:

> In interpreting a deed, the court's goal is to carry out the real intention of the parties. *C & G, Inc. v. Rule*, 135 Idaho 763, 766, 25 P.3d 76, 79 (2001). If an instrument does not reflect the true intent of the parties due to mutual mistake, then reformation of that instrument may be the proper remedy. *Bilbao v. Krettinger*, 91 Idaho 69, 72-73, 415 P.2d 712, 715-16 (1966). "A mutual mistake occurs when both parties, at the time of contracting, share a misconception regarding a basic assumption or vital fact upon which the bargain is based." *Hines v. Hines*, 129 Idaho 847, 853, 934 P.2d 20, 26 (1997). The court acts properly in reforming the instrument to reflect the agreement the parties would have made but for the mistake. *Bailey v. Ewing*, 105 Idaho 636, 640-41, 671 P.2d 1099, 1103-04 (Ct.App.1983). What the parties actually intended is a question of fact. *Id.* at 641, 671 P.2d at 1104. The party alleging the mutual mistake has the burden of proving it by clear and convincing evidence. *Collins v. Parkinson*, 96 Idaho 294, 296, 527 P.2d 1252, 1254 (1974).

In *Chandler v. Hayden,* 147 Idaho 765, 772, 215 P.3d 485, 492 (2009), this Court expanded upon this principle and stated:

> We have held that "a court is acting properly in reforming an instrument when it appears from the evidence ... that the instrument does not reflect the intentions of the parties and that such failure is the product of a mutual mistake, a mistake on the part of all parties to the instrument." *Collins v. Parkinson,* 96 Idaho 294, 296, 527 P.2d 1252, 1254 (1974). *See also Belk v. Martin,* 136 Idaho 652, 658, 39 P.3d 592, 598 (2001). **However, we emphasize that when reforming an instrument, the court gives effect to the contract that the parties did make, but that by reason of mistake was not expressed in the writing executed by them.** *Id.* (quoting *Uptick Corp. v. Ahlin,* 103 Idaho 364, 372, 647 P.2d 1236, 1244 (1982)). Thus, the district court is not free to reform the Agreement simply for the purpose of arriving at a result that is subjectively viewed as "fairer" to one of the parties. (Emphasis added.)

A mistake may justify grounds for relief if it is so substantial and fundamental that it defeats the object of the parties and does not accurately represent the agreement of both parties. *Belk v. Martin*, 136 Idaho 652, 657, 39 P.3d 592, 597 (2001).

The Missouri Court of Appeals in *In the Matter of O'Brien*, 600 S.W.2d 695, 697 (Mo.App. W.D.1980) broke this standard down to essential elements holding that to satisfy the burden, a party seeking reformation must establish by clear and convincing evidence: (1) a preexisting agreement between the parties; (2) the existence of a mistake and; (3) the mutuality of mistake.

2. The district court erred in weighing the evidence on Reagan's claim of mutual mistake and failing to draw all inferences in the light most favorable to Owen

Regan moved for summary judgment on the theory that there was a mutual mistake between the original sellers and buyers in the description of the northern boundary of the property purchased by Owen's remote predecessor in title, Smart. Regan contends that the parties to this transaction intended to place the northern boundary of the parcel along the center line of the 1979 proposed access road rather than on the section line of Section 34 as indicated in the deed. Regan asserts that ACH's realtor, George Kelly, caused this error by providing an incorrect legal description. The Plaintiffs support their theory of mutual mistake on the affidavits of Collins, English and Smart.

In analyzing this issue, the district court wholly disregarded Smart's deposition testimony even though the deposition took place a mere 14 days following the creation of the affidavit. Despite the relatively short period of time, Smart's deposition testimony was inconsistent with his affidavit as noted in the statement of facts. Further, there was no actual agreement reached regarding the northern boundary. It was not discussed between the parties.

Nevertheless, the trial court relied exclusively on Smart's affidavit that he "understood" the centerline of the existing road marked his northern property line in reaching its decision. In determining this testimony was clear and convincing testimony of a mutual mistake, the trial

court ignored Smart's inconsistent deposition testimony. It was error for the trial court to do so.

In *Capstar Radio Operating Company v. Lawrence*, 153 Idaho 411, 416, 283 P.3d 728, 733 (2012), this Court reviewed the standard for consideration of a motion for summary judgment when a jury trial is not requested and provided guidance regarding the trial court's function in drawing inferences and weighing evidence, holding:

> When an action will be tried before a court without a jury, the court may, in ruling on the motions for summary judgment, draw probable inferences arising from the undisputed evidentiary facts. Drawing probable inferences under such circumstances is permissible because the court, as the trier of fact, would be responsible for resolving conflicting inferences at trial. However, if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented, then summary judgment is improper. *Losee v. Idaho Co.,* 148 Idaho 219, 222, 220 P.3d 575, 578 (2009) (internal citations omitted).
>
> . . .Although the court, as the trier of fact, may draw the most probable inferences from the undisputed evidence, there are enough genuine issues of material fact to warrant deciding the merits of the case at trial. There is a fine line between drawing the most probable inferences and weighing the evidence, and this Court holds the belief that the district court should have allowed the case to go to trial in order to weigh the conflicting evidence and test the credibility of the witnesses.

The Court went on to observe that ". . .the record presents multiple instances in which witnesses have made contradictory statements regarding material facts. For instance, Funk's deposition testimony is inconsistent with his affidavit testimony regarding the location and formation of the GTC access road. . . . Moreover, Rook's deposition testimony contradicts his affidavit testimony regarding Rook's knowledge of Funk's use of the easement road. *Capstar* at 418. This Court further observed:

> This presented the district court with another evidentiary conflict regarding a material fact of whether Funk's prior usage of the access road was apparent and continuous over a number of years and whether Rook had adequate knowledge to testify to that matter. See *Baxter v. Craney,* 135 Idaho 166, 172, 16 P.3d 263, 269 (2000) (stating "it is not proper for the trial judge to assess the credibility of an affiant at the summary judgment

> stage when credibility can be tested in court before the trier of fact."); *Argyle v. Slemaker,* 107 Idaho 668, 670, 691 P.2d 1283, 1285 (Ct.App.1984) (holding that even when the court will serve as trier of fact, credibility determinations "should not be made on summary judgment if credibility can be tested by testimony in court before the trier of fact"). Yet, here, the lower court seems to have weighed the conflicting evidence and judged the affiants' credibility in making a ruling on summary judgment.
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> *Capstar* at 419.

Further, Collins testimony relied upon by the trial court did not support an inference of a mutual mistake. Collins testified by affidavit that the creation of the tax parcel was unintentional and a mistake. However, Collins did not testify that the mistake was mutual. Collins provided no testimony that the Grantors' intentions regarding the northern boundary of the parcel were ever discussed with Smart at the time the agreement was reached to sell the property.

Collin speculated that the mistake must have been due to their realtor drafting the legal description because he was "informed" of this fact. Collin provides no information of who informed him of this fact or when. The purchase and sale agreement required the seller to obtain a survey of the property. The legal description utilized was a metes and bounds description that Collin specifically approved on the conveyance deed, which clearly indicated the road went to the section line, and not the middle of an existing road. Collins testifies to no conversations between ACH and Smart regarding the northern boundary the northern boundary. Thus, the reasonable inference from Collins affidavit was that any mistake made was a unilateral mistake.

Finally, Collins and Smart testified in their affidavits that it was the intent of the parties that the northern boundary of the Smart parcel reach to the center of the "existing road". However, there were material disputed facts regarding the existence of the road at the time Smart purchased, let alone its centerline.

The 1979 and 1986 survey both clearly indicate the proposed access road was not constructed. The September, 1989 contract with Marchelli indicated the road was to be constructed. (This contract carries the initials in the footer of TRC, the same initials as lawyer Thomas R. Collins. R pp. 483-493.) The Smart purchase agreement indicates ACH has the responsibility of constructing the road. The testimony of neighbors Honeyman and Johnson indicated there was no road fronting the Smart parcel at the time Smart purchased. Jeff Owen testified when they purchased the road terminated at the eastern boundary of the parcel they purchased. 5/31/12 Preliminary Hearing Tr p. 264, ll. 22-25; p. 261, ll. 1-11. Honeyman indicated in her testimony the access road was extended to the end of her property in the early 1990's, after Smart's purchase, consistent with Collin's letter to Fasnacht.

It appears the trial court attempted to dodge these material issues of disputed fact in its analysis. The district court indicated in its opinion that the intention was to have the boundary of the parcel extend to the center of the 1979 proposed access road alignment without addressing the testimony that it was to run to the center of the existing road. However, that is not the testimony given by Smart, as noted in the statement of facts. Smart indicated he assumed his parcel extended to the center of the *existing* road. Given all the material issues of fact that were disputed, the trial court did not properly draw the inferences it was required to draw, and instead weighed the evidence.

3. Reagan failed to carry their burden of showing by clear and convincing evidence that there was a mutual mistake

As noted in the statement of facts, there is much confusion and dissent on the source of the mistake and how it arose. Regan argued to the district court that the mistake originated when realtor Kelly prepared a legal metes and bounds description that did not incorporate the proposed 1979 access road. However, the testimony is not that Kelly, a realtor, prepared a

complex metes and bounds descriptions, but rather that he was the person who delivered it to the title company when such a description was requested.

Pioneer Title's title officer, English, testified in his affidavit that Kelly *provided* the piece of paper to Pioneer Title that had the legal description written upon it. However, English did not testify that Kelly *prepared* the multifaceted metes and bounds legal description.

The purchase and sale agreement required ACH to obtain a survey. Smart testified at the time of the purchase that ACH was obtaining a survey in connection with the purchase.

Collins testified he was "informed" that Kelly prepared the legal description. Collins does not indicate who informed him of this fact or when he received such information. In addition, Collins acknowledged in his affidavit that ACH regularly used a surveyor to prepare its legal descriptions. Thus, the reasonable inference was that the survey was prepared by ACH's regular surveyor.

The district court found that "[t]"the weight of the evidence shows that it was most likely that the real estate agent used the wrong legal description on the one occasion that the real estate agent instead of the survey company was involved in drafting the legal description." This finding was not based upon clear and convincing evidence.

Moreover, the trial court did not draw all reasonable inferences in favor of Owen, the non-moving party. The evidence is not clear or convincing that Kelly prepared the legal description as found by the trial court. There is a difference between physically providing an item and physically preparing the item provided. The mere fact that Kelly delivered the legal description to Pioneer Title does not provide clear and convincing evidence that Kelly prepared it. It was just as reasonable given the testimony received by the trial court for it to draw the inference that Kelly, who was just a realtor, worked with the survey company that regularly did

ACH's work and obtained the legal description from them and thereafter delivered it to the title company.

Further, there was not clear and convincing evidence presented to the trial court that the mistake was mutual. The evidence before the trial court does not demonstrate any agreement actually reached between the parties. Collins testified to ACH's intent regarding placement of the northern boundary. He provided no testimony that this intent was ever discussed or relayed to Smart. The map of lots for sale provided to Smart at the time of the transaction did not indicate the lot would exist to the center line of the road. Even the 1986 survey showed tracts extending to the section line.

Smart's testimony establishes that there were no discussions regarding this item with Kelly, the only individual with whom Smart dealt. Smart testified he made an assumption that his lot extended to the center of an existing road. Smart never walked the property with Kelly, so there was no communication of this assumption. Smart's acknowledged that the corners were to be marked and a survey was to be done of the property, thus raising the inference that at the time Smart purchased the boundaries of the property were unknown to Smart. Further, the existence and location of any road(s) bordering the northern boundary of the property at the time Smart purchased is materially disputed. Finally, when Smart had the property surveyed, no concern was raised that the northern boundary was improperly located, leading to the inference that Smart did not recognize any mistake in the placement of the northern property boundary.

There certainly was not clear and convincing evidence before the district court that ACH and Smart "shared" a misconception about a basic assumption, since that basic assumption was never communicated between them. In fact, the reasonable inference from the

evidence to be drawn in a summary judgment proceeding was that there was no pre-existing agreement regarding placement of the northern boundary of the Smart parcel reached between the parties at the time the agreement was reached.

D. The district court erred in finding Owen was not a bona fide purchaser.

1. The law applicable to bona fide purchasers

In *Bailey v. Ewing,* 105 Idaho 636, 641, 671 P.2d 1099, 1104 (Ct.App. 1983) the Idaho Court of Appeals held:

> The general rule is that reformation will not be granted if it appears such relief will prejudice the rights of bona fide and innocent purchasers. *See* cases collected in 44 A.L.R. 78 (1926), supplemented by 79 A.L.R.2d 1180 (1961). A purchaser must lack notice both of the mistake and of the true intent of the parties, in order to prevent reformation. *Beams v. Werth,* 200 Kan. 532, 438 P.2d 957 (1968). Actual notice however is not required. *Elwood v. Stewart,* 5 Wash. 736, 32 P. 735 (1893). If there are circumstances which ought to put a party on inquiry as to ownership of property, that party is not considered a purchaser without notice and so cannot avoid reformation of the instrument. *Fajen v. Powlus,* 96 Idaho 625, 533 P.2d 746 (1975). *Walters v. Tucker,* 308 S.W.2d 673 (Mo.1957). . . . Whether a party is aware of circumstances sufficient to put him on inquiry is a question of fact. *Pfleuger v. Hopple,* 66 Idaho 152, 156 P.2d 316 (1945).

In order for grantors to be entitled to the reformation of a deed as between themselves and the grantee's successors in interest, the grantors are required to show that not only the original grantors but also all subsequent purchasers bought with notice of the mutual mistake in the original deed. 66 Am. Jur. 2d Reformation of Instruments § 62 (Westlaw database updated September 2013).

2. The trial court's analysis regarding Owen's status as a bona purchaser was flawed

The court in this case was not asked in this case to reform a deed between an original grantor and original grantee. Rather, it was requested to reform the deed of purchasers who

were removed from the original grantee by three transactions over a 15 year period of time at the time of the Owen's lot parcel was purchased from Hanna.

The trial court did not find that Owen had any actual knowledge of the alleged mistake in this matter which denied them status as a bona fide purchaser at the time they purchased the Smart parcel from Hanna in 2003. Instead, it found that Owen was not a bona fide purchaser because they knew at the time they purchased the tax parcel in 2005 that the northern boundary of their property was the section 27 line and "that no other party claimed ownership to or paid taxes on the Orphan Parcel." R p. 109. The trial court concluded that these two facts combined "...shows that the Owens were on inquiry notice in 2005 that the conveyance by the Original Owners to the Smarts may have contained an erroneous legal description." This conclusion was based upon a misguided analysis of the facts and applicable law.

There is nothing in the record to indicate that no other party claimed ownership of the tax parcel. At most, Owen was aware that someone did not pay taxes on the tax parcel and lost it in a tax deed process. Tax deed sales are a common occurrence. Second, section lines are common demarcations of property boundaries, so it was not unreasonable for Owen to believe that the section line was the dividing line between their property and the properties to the north. The mere fact that a parcel was available at a tax sale did not remove Owen's status as bona fide purchaser in 2003.

More importantly, the trial court focused on the wrong purchase, the wrong period of time, and the wrong instrument in determining Owen's status as good faith purchasers. The evaluation of Owen's status as bona fide purchasers by the trial court should have measured at the time they purchased the Smart parcel in 2003, not when they purchased the tax parcel two years later. In 2003, nothing alerted Owen to the fact that a mutual mistake had been made

between Smart and ACH. Unlike Regan, Owen had no reason to inquire if a 1979 access road alignment shown on a survey of a proposed subdivision had been effectuated for the benefit of providing a 60' contiguous access corridor for Regan. Thus, Owen was a bona fide purchaser and their deed from Hanna should not have been reformed by the trial court.

Moreover, the trial court did not discuss the status of Owen's predecessors as bona fide purchasers. Regan was required to show that all subsequent purchasers of the Smart parcel bought with notice of a mutual mistake in the original deed in order to defeat Owen's claim of being a good faith purchaser. There is no evidence that the successors to Smart had any knowledge of the alleged mistake.

The trial court also held that even if Owen was a bona fide purchaser, there was no prejudice to Owen if the deed were reformed because Owen's main interest in the tax parcel they purchased were assertions of asthenic value. R p. 110. Asthenic relates to a medical condition of asthenia, which is an abnormal physical weakness or lack of energy. It is believed the trial court meant aesthetic in nature.

The trial court cited no case law to support its holding that damage to aesthetic features does not constitute prejudice to a purchaser of land. In fact, the trial court engaged in no other discussion or analysis of prejudice other than to say it hadn't occurred in this case.

Owen purchased a parcel, the title of which was unencumbered by an express easement.[4] Therefore, Owen paid valuable consideration to own the entire bundle of property rights associated with that parcel. The reformation of the deed strips Owen of the value of their purchase without any compensation for the amount they paid to acquire the parcel.

[4] Regan has claimed a prescriptive easement across the existing access road for ingress and egress to his property. However, if there is an encroachment, it is very minor. By virtue of the deed reformation, the district court encumbered the entire tax parcel with an express easement much broader in scope than a prescriptive easement used for jogging, sporadic recreational use and ne short period for construction of an airplane landing strip.

The deed reformation leaves the tax parcel completely encumbered by an express easement. Owen was not compensated for the value they paid for the tax parcel. They lose exclusive control of the tax parcel. The trees and brush on the parcel may be removed for development of the road without Owen's permission. Owen may not utilize the land in any manner that is inconsistent with the burden of the express easement, whereas this limitation did not exist before reformation. In other words, Owen is prejudiced by the deed reformation.

E. The district court erred in failing to address the issues of waiver and estoppel raised by Owen in opposition to Regan's second motion for summary judgment

1. Law applicable to waiver and estoppel

Regarding waiver, in *Stoddard v. Hagadone*, 147 Idaho 186, 191, 207 P.3d 162, 167 (2009), this Court held:

> "Waiver is a voluntary, intentional relinquishment of a known right or advantage." *Brand S Corp. v. King,* 102 Idaho 731, 734, 639 P.2d 429, 432 (1981). "It is a voluntary act and implies election by a party to dispense with something of value or to forego some right or advantage which he might at his option have demanded and insisted upon." *Crouch v. Bischoff,* 78 Idaho 364, 368, 304 P.2d 646, 649 (1956). "A party asserting waiver must have acted in reliance upon the waiver and altered the party's position." *Hecla Mining Co. v. Star–Morning Mining Co.,* 122 Idaho 778, 782, 839 P.2d 1192, 1196 (1992).

With respect to the issue of waiver, in *Lawrence v. Hutchinson*, 146 Idaho 892, 901, 204 P.3d 532, 541, our Court of Appeals held:

> Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. *McKay v. Owens*, 130 Idaho 148, 152, 937 P.2d 1222, 1226 (1997) (quoting *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir.1996)). The policies underlying judicial estoppel are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings. *Id.* Judicial estoppel is intended to prevent a litigant from playing fast and loose with the courts, *Heinze*, 145 Idaho at 235, 178 P.3d at 600, and to prevent abuse of the judicial process by deliberate shifting of positions to suit the exigencies of a particular action, *McKay* 130 Idaho at 153, 937 P.2d at 1227

2. The trial court should have applied waiver to bar Regan's equitable claim for deed reformation

In opposition to Regan's second motion for summary judgment, Owen raised waiver and estoppel as issues precluding the equitable remedy of deed reformation. At the outset of this case, Regan filed a motion for partial summary judgment with the trial court seeking a declaration that they had a thirty foot easement across the north 30 feet of the Owen parcel. AR pp. 142-162. Owen did not oppose this motion other than to clarify that the express easement only benefited Parcel II of the four parcels claimed in Regan's complaint. AR pp. 163-171. Thereafter, the court entered an order granting Regan's motion for summary judgment declaring an express easement across Owen's parcel and declaring Regan had a right to use the easement for roadway and utility purposes without hindrance of obstruction from Owen. R pp. 76-77.

Thereafter, Regan proceeded to have a contractor develop the easement across the north 30' of the Owen parcel. The work that was done consisted of grubbing and clearing the easement, widening it, removing at least four large trees and brush from the easement, and bringing in road base material. AR pp. 181, 243, 255, 301; 5/31/12 Preliminary Hearing Tr p. 152, ll. 2-19, 158, ll. 9-15, 24-25; 159, ll. 1-6; p. 160, ll. 14-22; p. 102, l. 25, p. 163, p. 164, l. 1-4; 178, ll. 23-25, 179-180. Regan even confessed to trespassing on Owen's land outside the boundaries of the easement in developing it.

Following this election to develop the easement as called reserved in the Owen easement, Regan then requested that the trial court reform the Owen's deed to relocate the northern boundary, and thereby relocate the burden of the express easement. Owen argued to the trial court that Regan waived his right to seek a deed reformation by his actions taken to

develop the easement in its original location. Owen contended to allow Regan to reform the deed after removing trees and brush, widening the easement with heavy, equipment and importing foreign material onto the Owen parcel would be inequitable. The trial court ignored this issue in its decision.

When Regan made his election of remedy in this matter, he removed his right to ask the court to reform the deed. It is a well known maxim of equity that one who seeks equity must do equity. To alter the Owen parcel to such a significant degree and then ask to have that privilege shifted to a new location flies in the face of that maxim. Further, Owen did not dispute Regan's first motion for partial summary judgment assuming he had made his election of remedy. Owen never anticipated that Regan would turn around after such significant alterations to their parcel and ask to change the location of the easement, or that the trial court would entertain such an inequitable request.

Further, Regan is estopped from seeking deed reformation because he took one position in the first summary judgment proceeding and a completely different position in the second summary judgment proceeding. In the interim, he substantially developed the easement across the north 30' of the Owen parcel, thus placing a significant burden upon it that can't be restored if the deed reformation is granted. The large trees he removed are gone. The road bed he laid remains. Owen's property has been significantly altered.

Regan's change in position regarding the location of the easement is exactly the type of shift in position that is precluded by judicial estoppel. Regan made a conscious decision to proceed forward with declaring his rights under the Owen deed without reformation and developing the easement based upon the Section 27 line delineating the northern boundary of the Owen parcel. Thereafter, Regan deliberately shifted his position to the detriment of Owen

to have the deed reformed to relocate the northern boundary. It is exactly this type of deliberate shifting of positions to suit the exigencies of a particular party that judicial estoppel is designed to prevent. Thus, the trial court should have addressed this issue and held that Regan was judicially estopped from seeking reformation of Owen deed.

F. The district court erred in indicating it had ruled with respect to Regan's right to a prescriptive easement claim

Regan's second motion for summary judgment was limited to their deed reformation claim. In an unexpected turn of events, in the portion of the decision addressing findings of facts and course of proceedings, the trial court discussed the preliminary injunction in this matter and indicated "[t]he Court, then, determined that the Regans enjoy a thirty foot prescriptive easement that runs along the centerline of the proposed road." R p. 99.

This statement in an inaccurate summary of the trial court's findings at the preliminary injunction. The preliminary injunction was not a trial on the merits pursuant to I.R.C.P. 65(a)(2). Further, the statements made by the trial court were:

> Now, at least from the evidence, though, that's been presented in this particular hearing, I think that the Regans have established a likelihood that they would prevail on their claim for a prescriptive easement. It's important to understand that I don't think the law recognizes that this easement does not have to be a daily in-and-out-of-the-property-access easement but certainly continuous in some form over the prescriptive period. Now, even Ms. Honeywell [sic] acknowledged that the trucks were traveling back and forth during approximately 2000, when the airport runway was being constructed. Now, that was a short period of time but the testimony from Mr. Regan was is that he used this road on a regular basis when he was constructing his runway. He used it for other purposes over the years to get in and out of his property from that access point. It's not a necessity access but it was a useful access for the purposes of periodic work, construction. He engaged in, I think for lack of a better term, a charitable exercise to allow woodcutting on his property. And so vehicles were traveling back and for the purposes of cutting wood on his property over the years. He testified that his kids utilized the property for the purposes of their ATVs and that he would jog on this – on this property as well. Now, the Owenses and Ms. Honeywell do not agree with respect to the extent with which the property was used over the years but the Owens, of course, were not there

> but for the last year of the prescriptive period. And Ms. Honeywell certainly was there over a period of time and observed some use by Mr.—Mr. Regan. So I recognize that it's a relatively close call but for the purpose of this preliminary injunction, I'm satisfied that Mr. Regan has met his burden to establish that it appears now under the complaint that he's entitled to the relief with respect to the establishment of prescriptive easement over this access road to justify the issuance of a preliminary injunction that has been prayed for here. And so, on that basis the Court is prepared to go ahead and grant this preliminary injunction.
>
> June 4, 2012 Preliminary Hearing Tr p. 94, l. 23 – p. 96, l. 13.

Thus, the trial court's indication in its decision that the preliminary injunction resolved the disputed prescriptive easement claim, or established the scope and width of the burdens is not accurate. In fact, Regan presented no testimony regarding

VII. CONCLUSION

Based upon the argument presented herein, the trial court's grant of summary judgment should be reversed. Owen is entitled to summary judgment based upon their status as bona fide purchasers and/or based upon the applicable statute of limitations.

RESPECTFULLY SUBMITTED this 3rd day of October, 2013.

JAMES, VERNON & WEEKS, P.A.

SUSAN P. WEEKS
Attorneys for Appellants/Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of October, 2013, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Scott L. Poorman
Scott L. Poorman, P.C.
8884 North Government Way, Suite E
P.O. ox 2871
Hayden, ID 83835

☐ U.S. Mail
☑ Hand Delivered
☐ Overnight Mail

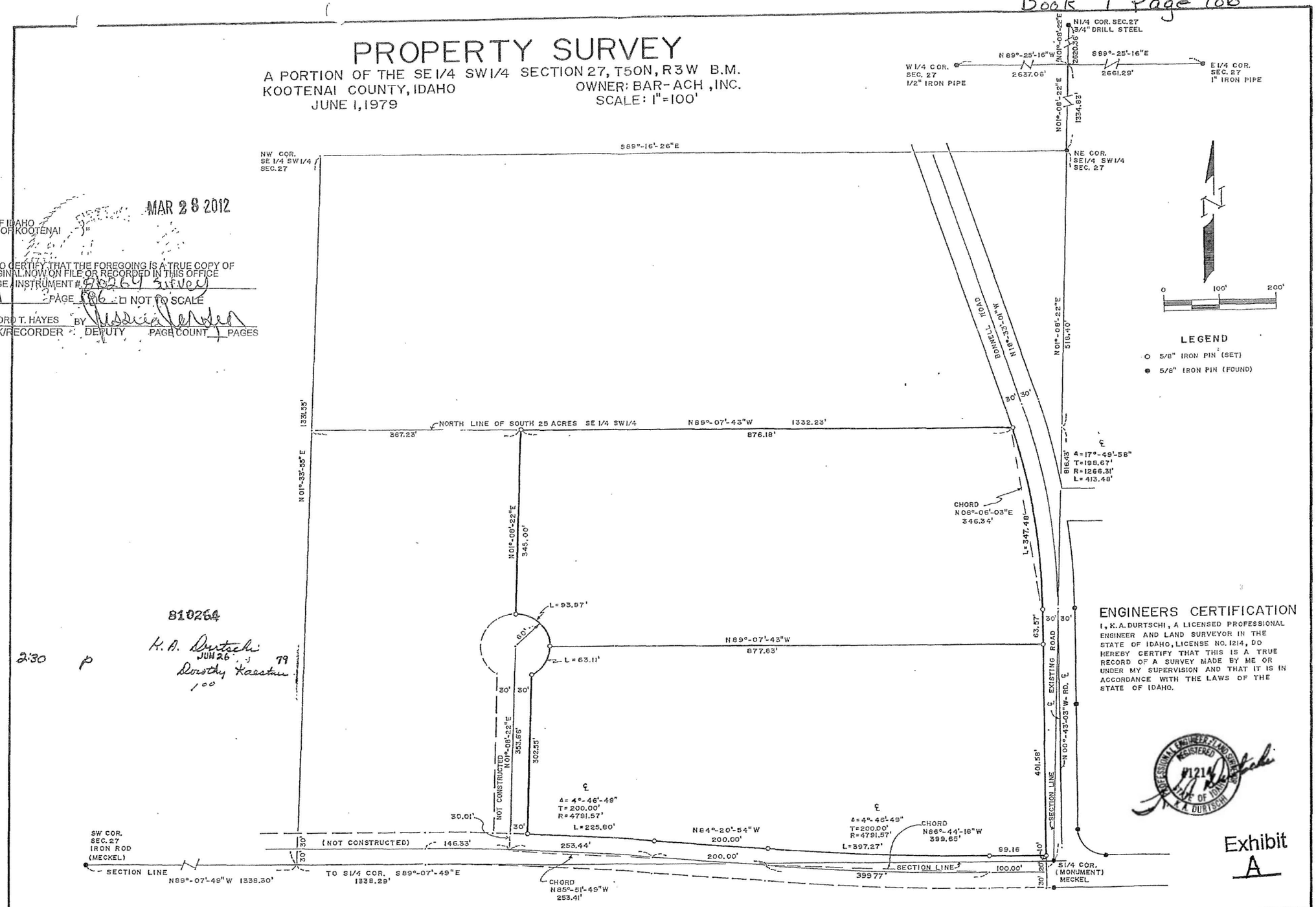
Christine Limoge

Book 1 Page 186

PROPERTY SURVEY

A PORTION OF THE SE 1/4 SW 1/4 SECTION 27, T50N, R3W B.M.
KOOTENAI COUNTY, IDAHO
JUNE 1, 1979

OWNER: BAR-ACH, INC.
SCALE: 1"=100'



ENGINEERS CERTIFICATION

I, K.A. DURTSCHI, A LICENSED PROFESSIONAL ENGINEER AND LAND SURVEYOR IN THE STATE OF IDAHO, LICENSE NO. 1214, DO HEREBY CERTIFY THAT THIS IS A TRUE RECORD OF A SURVEY MADE BY ME OR UNDER MY SUPERVISION AND THAT IT IS IN ACCORDANCE WITH THE LAWS OF THE STATE OF IDAHO.

PROFESSIONAL ENGINEER AND LAND SURVEYOR REGISTERED #1214 STATE OF IDAHO K.A. DURTSCHI

Exhibit A

STATE OF IDAHO
COUNTY OF KOOTENAI } ss

MAR 28 2012

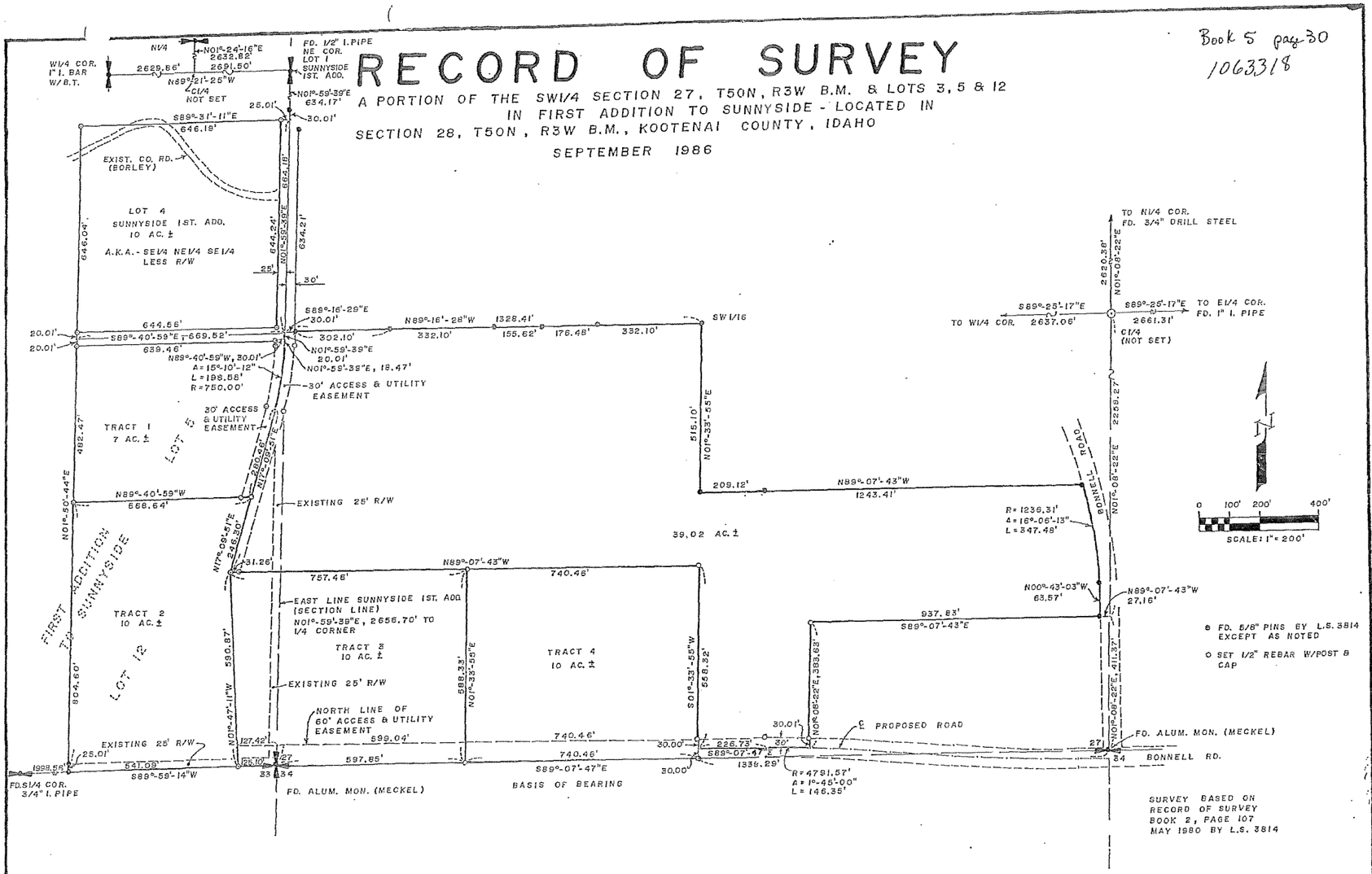
THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL NOW ON FILE OR RECORDED IN THIS OFFICE
MARRIAGE / INSTRUMENT # 810264 Survey
BOOK 1 PAGE 186 ☐ NOT TO SCALE
CLIFFORD T. HAYES BY Debra Jensen
CLERK/RECORDER DEPUTY PAGE COUNT 1 PAGES

810264
K.A. Durtschi
JUN 26 79
Dorothy Kaestner
2:30 P
100

Book 5 page 30
1063318

RECORD OF SURVEY

A PORTION OF THE SW1/4 SECTION 27, T50N, R3W B.M. & LOTS 3, 5 & 12
IN FIRST ADDITION TO SUNNYSIDE - LOCATED IN
SECTION 28, T50N, R3W B.M., KOOTENAI COUNTY, IDAHO
SEPTEMBER 1986



● FD. 5/8" PINS BY L.S. 3814 EXCEPT AS NOTED
○ SET 1/2" REBAR W/POST & CAP

SURVEY BASED ON
RECORD OF SURVEY
BOOK 2, PAGE 107
MAY 1980 BY L.S. 3814

Deutsch Engineers
40 2 P
10-27-86
Cheryl Road
5.00

SURVEYORS CERTIFICATE

I, EARL E. SANDERS, A REGISTERED LAND SURVEYOR IN THE STATE OF IDAHO, LICENSE NO. 3814, DO HEREBY CERTIFY THAT THIS IS A TRUE RECORD OF A SURVEY MADE BY ME OR UNDER MY SUPERVISION AND THAT IT IS IN ACCORDANCE WITH THE LAWS OF THE STATE OF IDAHO AT THE REQUEST OF GLEN E. MOERING.

Earl E. Sanders

STATE OF IDAHO
COUNTY OF KOOTENAI } ss.

THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL NOW ON FILE OR RECORDED IN THIS OFFICE
MARRIAGE / INSTRUMENT # 1063318
BOOK 5 PAGE 30
☐ NOT TO SCALE

CLIFFORD T. HAYES
CLERK/RECORDER BY
DEPUTY
PAGES

MAR 28 2012

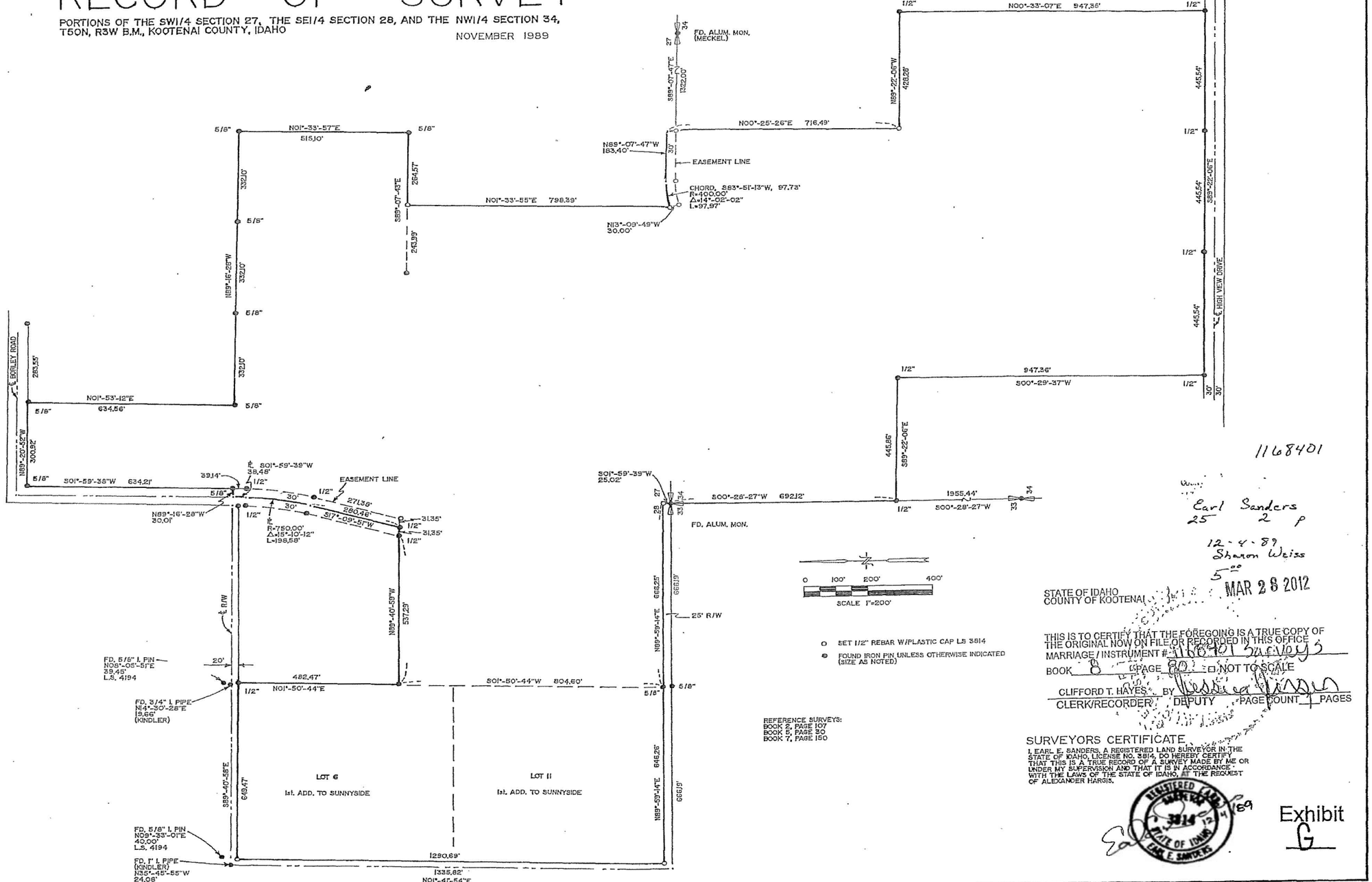
Exhibit
B

Bk 8 Pg 80

RECORD OF SURVEY

PORTIONS OF THE SW1/4 SECTION 27, THE SE1/4 SECTION 28, AND THE NW1/4 SECTION 34, T50N, R3W B.M., KOOTENAI COUNTY, IDAHO

NOVEMBER 1989



- SET 1/2" REBAR W/PLASTIC CAP LS 3814
- FOUND IRON PIN UNLESS OTHERWISE INDICATED (SIZE AS NOTED)

REFERENCE SURVEYS:
BOOK 2, PAGE 107
BOOK 5, PAGE 30
BOOK 7, PAGE 150

1168401

Earl Sanders
25 2 p
12-4-89
Sharon Weiss
5pp

STATE OF IDAHO
COUNTY OF KOOTENAI } ss
FILED MAR 28 2012

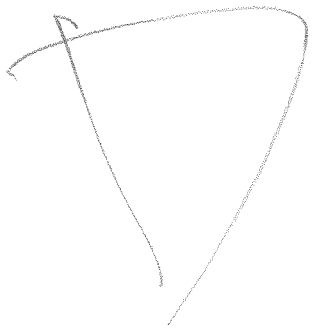
THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL NOW ON FILE OR RECORDED IN THIS OFFICE
MARRIAGE / INSTRUMENT # 1168401
BOOK 8 PAGE 80 DO NOT TO SCALE
CLIFFORD T. HAYES BY [signature]
CLERK/RECORDER DEPUTY PAGE COUNT 4 PAGES

SURVEYORS CERTIFICATE

I, EARL E. SANDERS, A REGISTERED LAND SURVEYOR IN THE STATE OF IDAHO, LICENSE NO. 3814, DO HEREBY CERTIFY THAT THIS IS A TRUE RECORD OF A SURVEY MADE BY ME OR UNDER MY SUPERVISION AND THAT IT IS IN ACCORDANCE WITH THE LAWS OF THE STATE OF IDAHO, AT THE REQUEST OF ALEXANDER HARRIS.

REGISTERED LAND SURVEYOR 3814 12-4-89 STATE OF IDAHO EARL E. SANDERS

Exhibit G



Book 16 Page 110

RECORD OF SURVEY

PORTION OF THE NORTHWEST QUARTER OF SECTION 34, TOWNSHIP 50 NORTH, RANGE 3 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO

COUNTY RECORDER

This map was filed in the Kootenai County Recorder's Office at the request of David Schumann this 15th day of December 1994, at 2:06 o'clock P M as Instrument No. 1381674 and duly recorded at Book 16, Page 110, of Surveys

By: Suzanne Browning Deputy $5.00

FOUND 1-1/2 INCH ALUMINUM CAP MARKED MICKEL ENGR. & SUR. S 28 S 27 S 33 S 34 LS 99

N 01°26'14" E 60.00'

S 89°07'47" E 2676.60' (M & R2)

S 89°07'50" E 226.37'

S 89°15'56" E 146.53'

60 FOOT ROAD

S 89°07'47" E 1356.57'

1338.35 (M) 1338.31 (R2)

S 89° 07'47" E 660.00'

S 89° 07'47" E 660.00'

SET 5/8 INCH REBAR WITH 2 INCH ALUMINUM CAP MARKED T50N R3W 1/4 S 27 S 34 1994 PLS 4182

SEE CP&F RECORDS

N 89°35'35" W 18.22'

N 77°46'08" W 2.20'

SCALE 1"=10'

N 00°33'06" E 686.31'

S 00°33'06" W 683.69'

S 00°33'06" W 680.98' (M & R3)

INST. NO. 1137747 10.38 ACRES

INST. NO. 1137749

INST. NO. 1162426

N 89°21'12" W 17.86'

N 89°21'26" W 660.00'

N 89°21'53" W 660.00'

N 89°21'12" W 428.04'

N 89°21'53" W 231.96'

S 89°22'06" E 891.72' (R3) 891.77' (M)

TRACT 10

TRACT 9

TRACT 8

TRACT 7

MAR 28 2012

STATE OF IDAHO } ss
COUNTY OF KOOTENAI }

THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL NOW ON FILE OR RECORDED IN THIS OFFICE
MARRIAGE / INSTRUMENT # 1381674 DAY 1995
BOOK 16 PAGE 110 ☐ NOT TO SCALE

CLIFFORD T. HAYES CLERK/RECORDER BY DEPUTY PAGE COUNT 1 PAGES

LEGEND

- ● – SET 1/2 INCH REBAR WITH YELLOW SURCAP MARKED PLS 4182
- ⊡ – FOUND 1/2 INCH REBAR WITH CAP MARKED 3814
- (M)– INDICATES FIELD MEASURMENT.
- ⊢⊣ – QUARTER CORNER MONUMENT AS DESCRIBED
- ┼ – SECTION CORNER MONUMENT AS DESCRIBED
- ⊢–⊣ – BARBED WIRE FENCE

RECORD MAPS

(R1) ROS BY DURTSCHI, 1979, AT BOOK 1, PAGE 186
(R2) ROS BY SANDERS, 1986, AT BOOK 5, PAGE 30
(R3) ROS BY SANDERS, 1989, AT BOOK 7, PAGE 150
(R4) ROS BY SANDERS, 1989, AT BOOK 8, PAGE 80

NOTE: ROAD LOCATION SHOWN ON R1 & R2

BASIS OF BEARING

THE BASIS OF BEARING FOR THIS MAP IS THE NORTH LINE OF THE NORTHWEST 1/4 OF SECTION 34, SHOWN AS S 89°07'47" E ON ROS FILED AT BOOK 5 OF SURVEYS, PAGE 30, BY BUD SANDERS IN OCTOBER, 1986

GRAPHIC SCALE

100 0 50 100 200 400

1 INCH = 100 FEET

SURVEYOR'S CERTIFICATION

THIS MAP CORRECTLY REPRESENTS A SURVEY PERFORMED BY ME IN ACCORDANCE WITH THE LAWS OF THE STATE OF IDAHO IN OCTOBER AND NOVEMBER, 1994 AT THE REQUEST OF LARRY RUNKLE FOR HAROLD SMART.

PROFESSIONAL LAND SURVEYOR STATE OF IDAHO DAVID E. SCHUMANN 4182

11/17/94

Exhibit D

KOOTENAI COUNTY SURVEYORS
W. 6075 QUAIL LANE
POST FALLS, IDAHO 83854
Ph. (208) 773-3628

POST FALLS DRAFTING SERVICE
111 LAUREL Ave.
POST FALLS, ID. 83854
Ph. (208) 773-1176

Book 19 page 23

STATE OF IDAHO
COUNTY OF KOOTENAI

THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL NOW ON FILE OR RECORDED IN THIS OFFICE
MARRIAGE / INSTRUMENT # 1148215 BOOK 19 PAGE 23

MAR 28 2012

CLIFFORD T. HAYES BY [signature] DEPUTY
CLERK/RECORDER

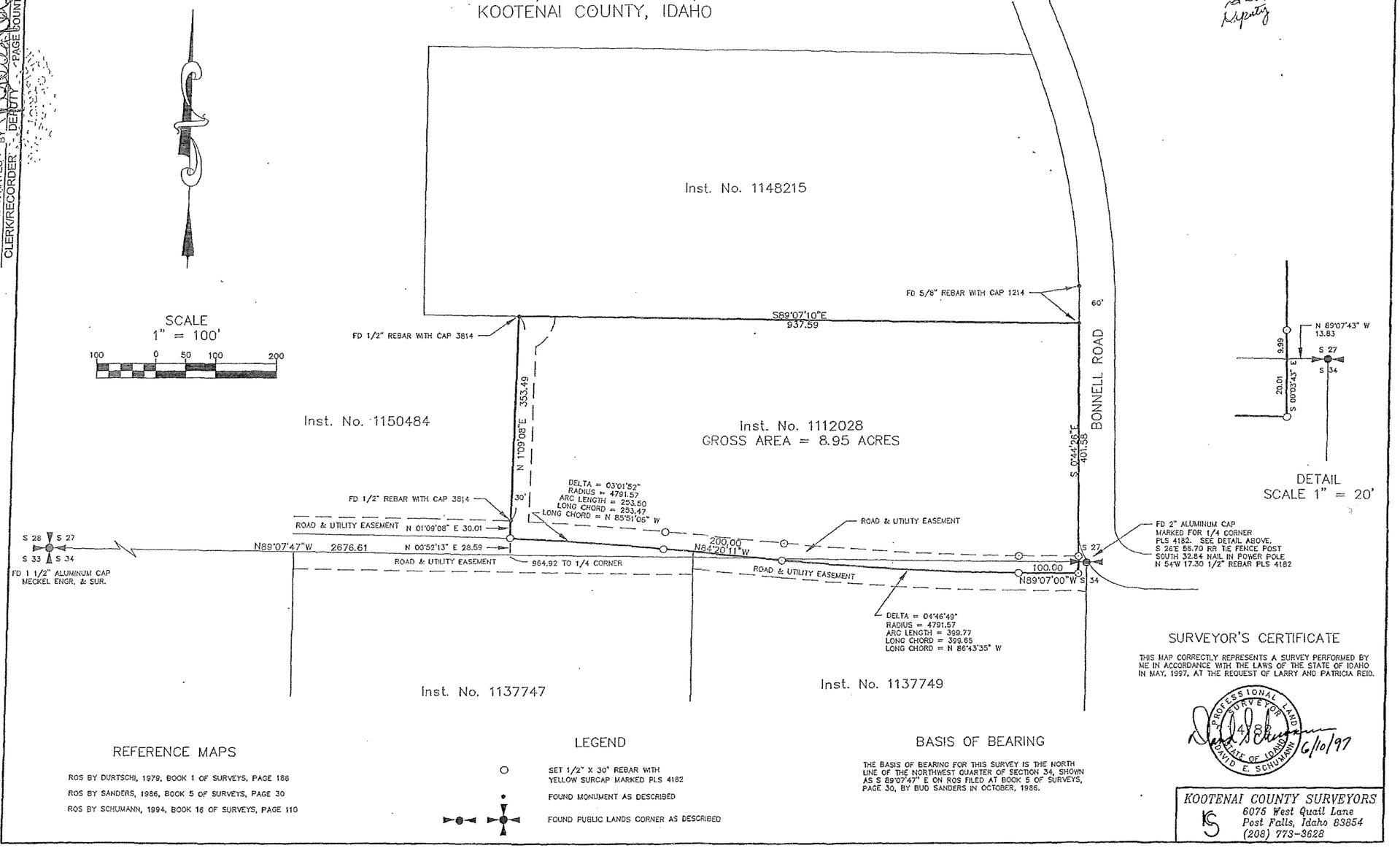
PAGE COUNT 1 PAGES

RECORD OF SURVEY

PORTION OF SE 1/4 SW 1/4 SECTION 27, AND NE 1/4 NW 1/4 SECTION 34
TOWNSHIP 50 NORTH, RANGE 3 WEST, BOISE MERIDIAN
KOOTENAI COUNTY, IDAHO

COUNTY RECORDER

This map was filed in the Kootenai County Recorder's Office at the request of David Schumann this 25th day of June 1997 at 12:01 o'clock P M, as Instrument No. 1495096 and duly recorded at Book 19 Page 23 of Surveys.
By: Danit Englar Deputy D. Rusk Deputy
Fee 5.00



REFERENCE MAPS

ROS BY DURTSCHI, 1979, BOOK 1 OF SURVEYS, PAGE 186
ROS BY SANDERS, 1986, BOOK 5 OF SURVEYS, PAGE 30
ROS BY SCHUMANN, 1994, BOOK 16 OF SURVEYS, PAGE 110

LEGEND

○ SET 1/2" X 30" REBAR WITH YELLOW SURCAP MARKED PLS 4182
• FOUND MONUMENT AS DESCRIBED
FOUND PUBLIC LANDS CORNER AS DESCRIBED

BASIS OF BEARING

THE BASIS OF BEARING FOR THIS SURVEY IS THE NORTH LINE OF THE NORTHWEST QUARTER OF SECTION 34, SHOWN AS S 89°07'47" E ON ROS FILED AT BOOK 5 OF SURVEYS, PAGE 30, BY BUD SANDERS IN OCTOBER, 1986.

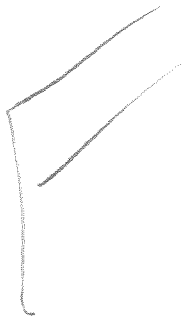
SURVEYOR'S CERTIFICATE

THIS MAP CORRECTLY REPRESENTS A SURVEY PERFORMED BY ME IN ACCORDANCE WITH THE LAWS OF THE STATE OF IDAHO IN MAY, 1997, AT THE REQUEST OF LARRY AND PATRICIA REID.

PROFESSIONAL LAND SURVEYOR
STATE OF IDAHO
DAVID E. SCHUMANN
5148
6/10/97

KOOTENAI COUNTY SURVEYORS
6075 West Quail Lane
Post Falls, Idaho 83854
(208) 773-3628

Exhibit C



RECORD OF SURVEY

PORTION OF SE 1/4 SW 1/4 SECTION 27
TOWNSHIP 50 NORTH, RANGE 3 WEST, BOISE MERIDIAN
KOOTENAI COUNTY, IDAHO

Book 26 Page 405
COUNTY RECORDER

This map was filed for record in the Kootenai County Recorder's Office at the request of David Schumann this 15th day of July 2010 at 1:11 o'clock P M, as Instrument No. 2273296000 and duly recorded at Book 26 Page 405 of Surveys.
By: Debbie Sala Fee 15.00
Deputy
Daniel J. English, Recorder

STATE OF IDAHO
COUNTY OF KOOTENAI
MAR 28 2012

THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL NOW ON FILE OR RECORDED IN THIS OFFICE
MARRIAGE / INSTRUMENT # 2273296000
BOOK 26 PAGE 405 IS NOT TO SCALE
CLIFFORD T. HAYES BY [signature] DEPUTY
CLERK/RECORDER PAGE COUNT 1 PAGES

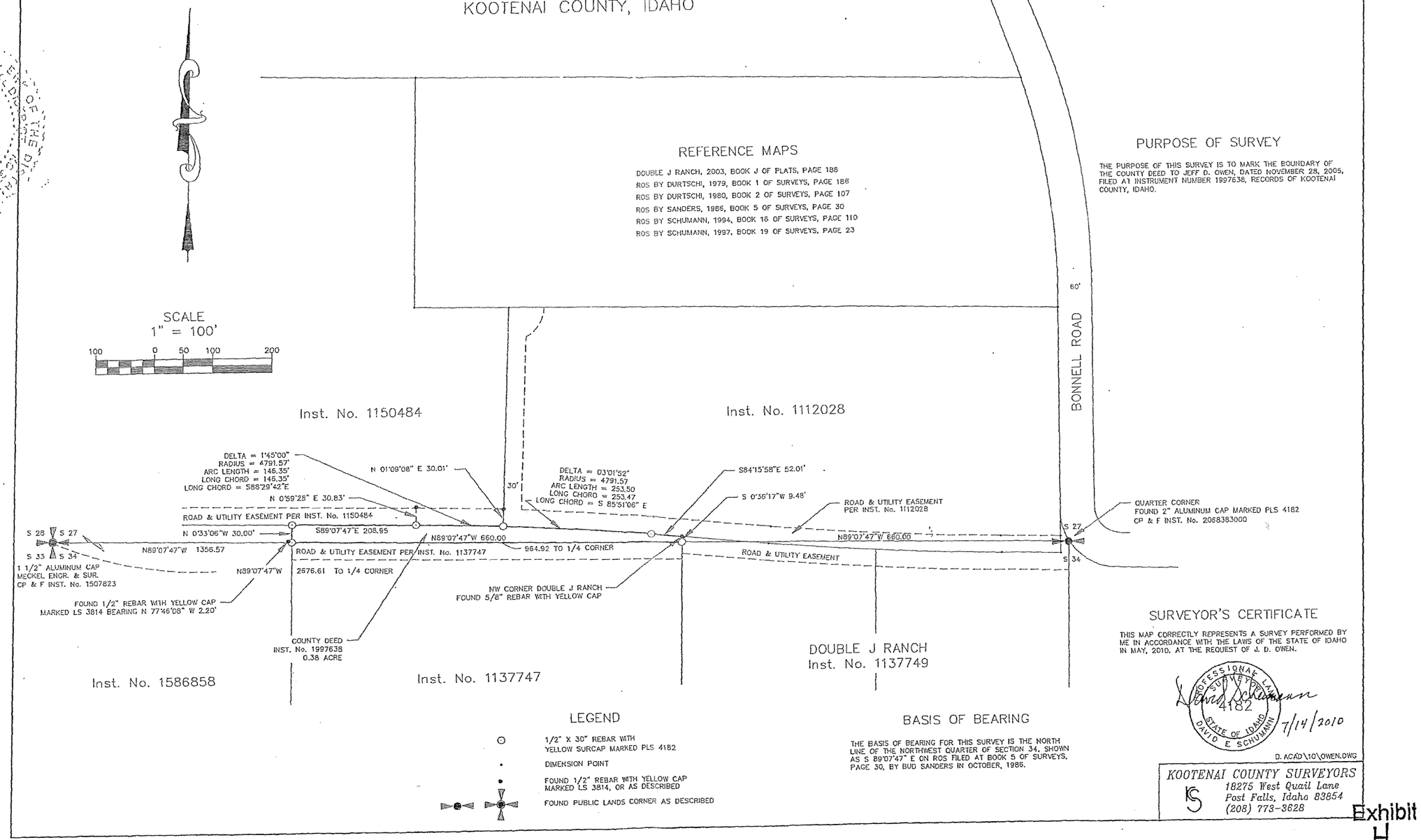
REFERENCE MAPS

DOUBLE J RANCH, 2003, BOOK J OF PLATS, PAGE 188
ROS BY DURTSCHI, 1979, BOOK 1 OF SURVEYS, PAGE 186
ROS BY DURTSCHI, 1980, BOOK 2 OF SURVEYS, PAGE 107
ROS BY SANDERS, 1986, BOOK 5 OF SURVEYS, PAGE 30
ROS BY SCHUMANN, 1994, BOOK 18 OF SURVEYS, PAGE 110
ROS BY SCHUMANN, 1997, BOOK 19 OF SURVEYS, PAGE 23

PURPOSE OF SURVEY

THE PURPOSE OF THIS SURVEY IS TO MARK THE BOUNDARY OF THE COUNTY DEED TO JEFF D. OWEN, DATED NOVEMBER 28, 2005, FILED AT INSTRUMENT NUMBER 1997638, RECORDS OF KOOTENAI COUNTY, IDAHO.

SCALE
1" = 100'
100 0 50 100 200



LEGEND

- ○ 1/2" X 30" REBAR WITH YELLOW SURCAP MARKED PLS 4182
- • DIMENSION POINT
- • FOUND 1/2" REBAR WITH YELLOW CAP MARKED LS 3814, OR AS DESCRIBED
- FOUND PUBLIC LANDS CORNER AS DESCRIBED

BASIS OF BEARING

THE BASIS OF BEARING FOR THIS SURVEY IS THE NORTH LINE OF THE NORTHWEST QUARTER OF SECTION 34, SHOWN AS S 89°07'47" E ON ROS FILED AT BOOK 5 OF SURVEYS, PAGE 30, BY BUD SANDERS IN OCTOBER, 1986.

SURVEYOR'S CERTIFICATE

THIS MAP CORRECTLY REPRESENTS A SURVEY PERFORMED BY ME IN ACCORDANCE WITH THE LAWS OF THE STATE OF IDAHO IN MAY, 2010, AT THE REQUEST OF J. D. OWEN.

PROFESSIONAL LAND SURVEYOR 4182 STATE OF IDAHO DAVID E. SCHUMANN
7/14/2010

D:\CAD\10\OWEN.DWG

KOOTENAI COUNTY SURVEYORS
18275 West Quail Lane
Post Falls, Idaho 83854
(208) 773-3628

Exhibit H